Dauman Pallet, Inc., Dauman Recycling, Inc., and Dauman Industries, a Single Employer, and Joseph D'Amiano and David D'Amiano, Individually *and* Plastic, Metal, Trucking, Warehouse and Allied Workers Union Local 132-98-102, International Ladies Garment Workers' Union, AFL–CIO. Cases 22–CA–18105, 22–CA–18199, 22–CA–18304, 22–CA–18415, and 22–RC–10545

June 30 1994

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

The issues in this case include whether the administrative law judge correctly found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act, certain of which interfered with a representation election, and that a bargaining order is appropriate to remedy such unlawful conduct.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified below,[4] and to adopt the recommended Order, as modified.

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees on November 1 and 4, 1991.[5] In so finding, the judge relied on three factors: (1) all of the laid-off employees had signed union authorization cards; (2) the layoff occurred just 1 week after the Union filed its petition for an election; and (3) the business reasons proffered by the Respondent for the layoff were pretextual. We agree with the judge that the foregoing evidentiary factors establish the Respondent's unlawful motivation for the layoffs. In addition, we find that other evidence, discussed below, further supports the finding of unlawful motivation and further refutes the Respondent's claim that it had no knowledge of the identities of union supporters at the time of the layoffs.

Employee Domitilo Sanchez testified about a conversation with the Respondent's coowner, David D'Amiano, late in the evening of October 31. According to Sanchez, D'Amiano telephoned and asked to meet him in front of Sanchez' apartment building. D'Amiano arrived in a car with employee Peter DeMarco. D'Amiano told Sanchez that he knew employees were holding union meetings in the building. He asked Sanchez what he knew about them. Sanchez denied having any knowledge of the Union.

Sanchez further testified about a conversation at work the next day with Supervisor Thomas Kenney. Kenny said that ''something bad'' was going to happen—that ''the rest of the employees were going to be thrown out'' and Sanchez was going to be the only one to remain. The Respondent implemented the unlawful layoffs that day.

The complaint alleged, inter alia, that David D'Amiano unlawfully interrogated Sanchez on October 31 and that Kenney unlawfully conveyed to Sanchez on November 1 an implied threat of layoff due to employees' union activity. The judge did not pass on these allegations of the complaint, citing a need to expedite his disposition of the case. We deem it appropriate to pass on these matters, and we find the violations. We note that the judge credited other critical aspects of Sanchez' testimony and that his testimony about the conversations with David D'Amiano and Kenney is uncontradicted. We, therefore, find that the Respondent's officials violated Section 8(a)(1) by interrogating and making an implied threat to Sanchez. We further find that this unlawful conduct indicates the Respondent's specific knowledge of the identity of union card signers and its intent to retaliate against them on the day of the layoffs.

Employees Mario Mendoza and Nehemias Alvarado testified about a conversation with employee Peter DeMarco on November 1, 1991. According to them, Peter DeMarco said that, during the previous evening, employee Joseph Trujillo told DeMarco and David

[1] On February 23, 1993, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The General Counsel filed an answering brief. The Respondent filed a brief opposing the General Counsel's exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II,P of the judge's decision, he mistakenly stated that the layoffs of employees Lucio Ortiz and Albino Diaz and the opening of the unfair labor practice hearing in this case took place in 1991. These events occurred in 1992. In sec. II,T of his decision, the judge stated that Supervisor Robert Buglioli unlawfully interrogated employee Mario Mendoza and coowner David D'Amiano unlawfully threatened employee Albino Diaz in November 1992. These events occurred in 1991.

[3] The General Counsel has excepted to the judge's failure to make findings and conclusions relating to complaint allegations that the Respondent violated Sec. 8(a)(3) of the Act by changing pallet production quotas, by refusing to pay employees for the repair of some pallets, and by refusing to cash employees' paychecks. We have reviewed the record and we find that, as with similar complaint allegations regarding the reduction in the amount of overtime employees were permitted to work, the General Counsel has failed to present a prima facie case that the Respondent violated the Act as alleged.

[4] Although the judge found that the Respondent violated Sec. 8(a)(3) of the Act by issuing a disciplinary warning to Marco Zarate, he failed to include Zarate's name in the conclusions of law. We have included Zarate's name in an amended conclusion of law in this decision.

[5] Unless otherwise stated, all dates are in 1991.

D'Amiano the names of all the card signers. They further testified that DeMarco told them that D'Amiano was going to fire all the people who signed cards. The judge found that DeMarco did not speak as the Respondent's agent. Consequently, the employees' testimony about DeMarco's statements to them was hearsay.[6]

We agree with the judge that DeMarco did not speak as the Respondent's agent. We nevertheless find that the hearsay testimony about DeMarco's statements to Mendoza and Alvarado was admissible and entitled to some weight in evaluating the Respondent's conduct. The Board has long held that it will admit hearsay evidence ''if rationally probative in force and if corroborated by something more than the slightest amount of other evidence.'' *RJR Communications*, 248 NLRB 920, 921 (1980); *Livermore Joe's Inc*., 285 NLRB 169 fn. 3 (1987).

The hearsay statements in this case are certainly probative on the issues of the Respondent's knowledge of union activity and motivation for the layoffs. Furthermore, the credible, nonhearsay testimony of Sanchez, discussed above, proves that DeMarco was in the company of David D'Amiano on the evening of October 31, that David D'Amiano was aware of and looking for details about employees' union activity, and that, on the very next day, the Respondent took action against those whom it believed supported the union by laying them off. Sanchez' testimony and the nonhearsay evidence reviewed in the judge's decision provide far more than the ''slightest amount'' of corroboration required for the admission and consideration of the hearsay testimony about what DeMarco said to Mendoza and Alvarado. Accordingly, we find that this uncontroverted testimony provides further proof that the Respondent knew the identities of union card signers and intended to retaliate against them.

2. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Mario Mendoza on April 28, 1992. The Respondent contends in exceptions that officials of Pathmark, an independent company for which the Respondent's employees repaired pallets, were solely responsible for the decision to terminate his job there. Even assuming the truth of this contention, we find that the Respondent was ultimately responsible for Mendoza's unlawful discharge.

Prior to the election, Mendoza had worked at the Respondent's Carteret yard as an hourly paid laborer. The Respondent did not lay him off on November 1. On November 6, however, he joined other employees in an unfair labor practice strike to protest the layoff. Mendoza testified that when he went to pick up his paycheck on November 8, David D'Amiano said that Mendoza had ''betrayed'' him and ''stabbed him in the back'' by going out on strike.[7] Mendoza was recalled to work at Carteret in late November. On December 13, he acted as the Union's election observer. On December 14, the Respondent transferred Mendoza to Pathmark to repair pallets.[8] Mendoza had no experience performing this type of work.

On April 18, 1992, a Pathmark official informed Mendoza that he could no longer work there. Later that day, Mendoza went to speak with David D'Amiano at the Respondent's Carteret facility. As he entered D'Amiano's office, dispatcher Anthony Fabrizio advised him, ''I'm sorry, there is nothing we can do for you.'' Mendoza then asked D'Amiano why he had been fired. D'Amiano replied that it was because he was not repairing the pallets correctly.

Joseph D'Amiano, David's father and the Respondent's coowner, testified that if Pathmark officials tell him that they do not want an employee working there, ''[W]e take him out of Pathmark . . . and we take him back. If we have work available, and I've done this over and over before.'' Even assuming then that the Respondent had no involvement in the decision ousting Mendoza from pallet repair work at Pathmark, his employment with the Respondent would not have automatically ended had the Respondent been applying its policies without discrimination.

D'Amiano further testified that he would have put Mendoza back to work if there had been any positions available, but that none was open. The Respondent's payroll records reveal, however, that between April 1 and June 15, 1992, the Respondent hired at least 18 new employees. Accordingly, in light of the General Counsel's prima facie case of unlawful motivation for Mendoza's discharge, we find that the Respondent has failed to prove that it would not have retained Mendoza after his return from Pathmark, in the absence of his union activities.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 10.

[6] The employees' testimony is uncontroverted. Although the judge did not specifically credit it, he generally credited other aspects of Mendoza's testimony and he credited Alvarado's testimony wherever, as here, it was corroborated by another witness.

[7] The judge credited Mendoza's testimony and relied on it as evidence supporting the complaint's allegation that the Respondent unlawfully discharged Mendoza. He made no finding regarding the complaint's allegation that D'Amiano's statements violated Sec. 8(a)(1). In accord with the General Counsel's exceptions, we expressly find that these statements were unlawful. Except concerning the additional 8(a)(1) findings previously made in this decision, we find no need to pass on other 8(a)(1) complaint allegations which the judge chose not to resolve. Any additional findings would merely be cumulative and would not affect the remedy for the Respondent's unfair labor practices.

[8] The judge incorrectly stated in sec. II,S of his decision that Mendoza repaired pallets at Carteret after he returned to work on November 20.

''10. The Respondent violated Section 8(a)(3) and (1) of the Act by issuing disciplinary warnings to employees Cuenca, Vasquez, Ramblas, and Zarate.''

2. Insert the following as Conclusions of Law 16, 17, and 18, and renumber subsequent conclusions accordingly.

''16. The Respondent violated Section 8(a)(1) of the Act by interrogating Domitilo Sanchez about union activities on October 31.

''17. The Respondent violated Section 8(a)(1) of the Act by impliedly threatening Domitilo Sanchez on November 1 that employees would be laid off or discharged because of their union activities.

''18. The Respondent violated Section 8(a)(1) of the Act by telling employee Mario Mendoza on November 8 that he had stabbed the Respondent's coowner in the back by participating in an unfair labor practice strike.''

AMENDED REMEDY

1. On July 7, 1992, Nehemias Alvarado resigned from his position at Pathmark where he had repaired pallets for the Respondent on a piece-rate basis. There are no exceptions to the judge's recommended dismissal of the complaint allegation that the Respondent constructively discharged Alvarado, in violation of Section 8(a)(3) and (1) of the Act, i.e., that discriminatory onerous working conditions at Pathmark caused his resignation. The General Counsel does except, however, to the judge's failure to find that Alvarado is still entitled to remedial reinstatement and backpay because he was one of a group of employees whom the Respondent unlawfully transferred from Carteret to Pathmark prior to the Board election on December 13, 1991.[9] We find merit in this exception.

Until December 1991, Nehemias Alvarado was an hourly paid laborer on the day shift at Carteret. The judge stated in section II,R of his decision that the Respondent laid off Alvarado on December 10, then recalled him to the Pathmark job. Consequently, the judge found that Alvarado's ''reassignment was somewhat different from the other people who were [unlawfully] transferred to Pathmark before the election.'' The judge recommended that the Respondent remedy the unlawful preelection transfers by offering to reinstate affected employees to their old jobs and by making them whole for any difference between earnings received in their old jobs and earnings received in the jobs to which they were unlawfully transferred.

Contrary to the judge, Alvarado's testimony and company payroll records conclusively establish that the Respondent transferred him directly from his Carteret job to the Pathmark job on December 12, 1 day before the Board election. He therefore belongs in the group of unlawfully transferred union supporters entitled to the make-whole relief recommended by the judge. The finding that Alvarado subsequently resigned voluntarily from the Pathmark job does not alter his entitlement to relief from his unlawful transfer to that job. But for the unlawful transfer to Pathmark, Alvarado would have continued to work at Carteret from and after December 12. There is no showing that he would have resigned if he had remained at Carteret. The work at Pathmark involved different hours, a different method of pay, and greater physical effort than in his prior job at Carteret. Under these circumstances, there is no basis for concluding that Alvarado would not have continued working for the Respondent if the Respondent had not unlawfully transferred him from his job at Carteret. See *Goodman Investment Co*. 292 NLRB 340 (1989).

2. The General Counsel also excepts to the judge's failure to order that the provisions of the remedial notice to employees, which the Respondent must post, be set forth in both English and Spanish. In light of evidence that many of the Respondent's employees are primarily or exclusively Spanish-speaking, we find merit in the exception and shall order that the notice be printed in Spanish and English.

3. We agree with the judge that the unfair labor practices alleged as objectionable conduct warranted setting aside the election held on December 13. We further agree, for the reasons fully set forth in the judge's decision, that a bargaining order is appropriate to remedy the Respondent's unlawful conduct.[10] However, we disagree sua sponte with the judge that it is therefore unnecessary to open and count determinative challenged ballots and to issue a revised tally of ballots in the December 13 election.[11] In accord with well-established Board precedent, we find that these ballots should be opened and counted. If, on the basis of these ballots, a majority of employees have voted for the Petitioner, it is entitled to a certification of representative. This certification of representative shall be in addition to our bargaining order. See *A.P.R.A. Fuel Oil*, 309 NLRB 480, 481–482 (1992), enfd. by unpublished order, No. 93-4263 (2d Cir. 1994). Accordingly, we shall sever and remand Case 22–RC–10545 to the Regional Director for further proceedings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

[9] At one point in sec. II,I of the judge's decision, he mistakenly refers to a December 10 election date. As correctly stated elsewhere in the decision, the election took place on December 13.

[10] We note that the United States District Court for the District of New Jersey, in an injunction affirmed by the United States Court of Appeals for the Third Circuit, has found the issuance of an interim bargaining order under Sec. 10(j) to be just and proper relief under the circumstances of this case.

[11] There are no exceptions to the judge's recommended disposition of challenged ballots, including the overruling of challenges to six ballots.

modified below and orders that the Respondent, Dauman Pallet, Inc., Dauman Recycling, Inc., and Dauman Industries, a Single Employer, and Joseph D'Amiano and David D'Amiano, individually, Carteret, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

''(e) Post at its facilities in New Jersey copies of the attached notice marked ''Appendix C.''[32] Copies of the notice, in both Spanish and English, on forms provided by the Regional Director Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

IT IS FURTHER ORDERED that Case 22–RC–10545 is severed from Cases 22–CA–18105, 22–CA–18199, 22–CA–18304, and 22–CA–18415, and that it is remanded to the Regional Director for Region 22 for action consistent with the following direction.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 22 shall, within 14 days from the date of this decision, open and count the ballots of Michael Cimilluca, Lee Roy Holmes, Daniel Smith, Anthony Salerno, Michael Becker, and Sacramento Rojas and that he prepare and serve on the parties a revised tally.

If the final revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 22–RC–10545.

Marguerite R. Greenfield Esq., Bert Dice Goldberg Esq., and *Greg Alvarez Esq.*, for the General Counsel.
John Craner Esq. (Craner, Nelson, Satkin & Scheer), for the Respondent.
Lester Kushner Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on various dates from June 1 to October 2, 1992.

The petition for an election was filed in Case 22–RC–10545 on October 21, 1991, which is the same date that the Union made a demand for recognition on the Employer. On November 20, 1991, the parties entered into a Stipulated Election Agreement, agreeing to an election to be held on December 13, 1991. It was agreed that November 17, 1991, was the payroll eligibility date, meaning that no employee hired after that date would be eligible to vote.

The parties agree that the appropriate unit consists of:

> All production and maintenance employees, including employees employed by the company at Pathmark (Woodbridge, New Jersey) and Rickel's (South Plainfield, New Jersey) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The election was held on December 13, 1991, and the outcome was as follows:

Approximate number of eligible voters	95
Void ballots	0
Votes cast for Petitioner	35
Votes cast against Petitioner	31
Challenged Ballots	21

On December 15, 1991, the Union filed objections to the election alleging much of the same conduct as it alleged as constituting unfair labor practices as set forth below. The Union withdrew its Objection 15.

As noted above, the challenged ballots were determinative.

The Union challenged the votes of the following people, alleging that they were supervisors:

Robert Buglioli	George Salerno
Sacramento Rojas	Anthony Salerno
Thomas Kenny	Michael Becker

The Union challenged votes of the following people alleging that they were irregular part time workers.

Anthony Salerno	Vincent Gatto
Lee Roy Holmes	Jack Lambly (The company conceded that he was not eligible.)

The Union challenged the votes of the following people alleging that they were not employed on the eligibility date (Nov. 17, 1991) or the date of election:

Richard Menkin	The company conceded that he was not eligible.
Michael Cimilluca	Maurice Murchison
William Curry	George Salerno

The Union challenged the votes of the following people, contending that they were longer employed at the time of the election:

Martin Duffy	James Gatto
Daniel Zrodsky	The company conceded that he was not eligible.

The Union challenged the votes of *Alex Barowski* contending he was a part time employee, *Owen Sharkey* contending that he was a temporary employee, and *Kenneth Gilliam*, contending that he was not employed as of the eligibility date.

Finally, the Union challenged the vote of *Daniel Smith* contending he was a guard.

In addition, the Board agent running the election, challenged the vote of *Michael Murray* as his name was not on the voter eligibility list. (This is a list prepared by the employer prior to the election and does not purport to be an agreement by either party that the persons whose names are on the list are the only eligible voters or are themselves eligible to vote.)

During the hearing, the employer conceded that Jack Lambly Daniel Zrodsky and Richard Menkin were not eligible voters. Therefore, the challenges to their ballots should be sustained.

The charge and amended charges in Case 22–CA–18105 were filed on November 12, 19, and December 18, 1991. The charge in Case 22–CA–18199 was filed on January 3, 1992. The charge in Case 22–CA–18304 was filed on February 27, 1992, and the charge in Case 22–CA–18415 was filed on April 14, 1992. The original complaint was issued on April 28, 1992, and the consolidated amended complaint was issued on May 15, 1992.

As amended, the complaint alleges in substance:[1]

1. That from October 1 to November 2, 1991, a majority of the employees in the unit selected the Union as their bargaining agent.

2. That the Union's request to bargain, made on October 21, 1991, was denied.

3. That on October 31, 1991, David D'Amiano at Woodbridge created the impression of surveillance.

4. That on October 31, 1991, David D'Amiano at Woodbridge interrogated employees about their union activities.

5. That on November 1 and 4, 1991, Peter DeMarco (a) threatened employees with layoff, (b) created the impression of surveillance, and (c) interrogated employees about the Union. (DeMarco is not a supervisor but the General Counsel contends that he was an agent of the Respondent by virtue of his participation in certain antiunion actions during late October and/or early Nov. 1991.)

6. That on November 1, 1991, the Respondent laid off the 24 employees named below because of their union activities or sympathies.

Nehemias Alvarado	Ignacio Landaverde
Rodrigo Amerngolt	Etelberto Mendoza
Juan Cantu	Adriancito Contreras
Cuhuatemoc Cuenca	Jose Luis Paz
Albino Diaz	Roberto Pena
Hector Galves	Jose Ponce
Leovigildo Gomez	Isidro Ramblas
Antonio Gonzalez	Francisco Reyes
Adelfo Guzman	Mario Vasquez
Alejandrino Guzman	Pedro Ventura
Serbando Herrera	Marco Zarate
Augustin Jerez	Florencio Moctezuma

7. That on November 1, 1991, the Respondent eliminated the overtime hours of the employees named above.

8. That on November 4, 1991, the Respondent for discriminatory reasons laid off Manuel Garcia.

9. That on November 5, 1991, Robert Buglioli Jr, at either Carteret or Woodbridge (a) interrogated employees and (b) threatened employees with layoff.

10. That on November 5, 1991, certain employees commenced an unfair labor practice strike.

11. That on November 6, 1991, David D'Amiano promised benefits, told employees that it would be futile to select a union and interrogated employees.

12. That on November 6, 1991, Joseph D'Amiano promised increased benefits and improved conditions of employment if the employees rejected the Union.

13. That on November 7, 1991, Joseph D'Amiano promised increased benefits and improved conditions of employment if the employees rejected the Union.

14. That on November 8, 1991, David D'Amiano threatened not to reinstate employees because of their union activity.

15. That on November 8, 1991, David D'Amiano for discriminatory reasons, raised the rent he charged to employee Lucio Ortiz for the use of an apartment.

16. That on November 11, 1991, David D'Amiano threatened plant closure.

17. That on November 12 and 13, 1991, the Union made an unconditional offer to return to work on behalf of the strikers:[2]

Efrain Camacena	Tomas Cervantes
Juan Reyes	Francisco Reyes
Mario Mendoza	Avelardo Murillo
Policarpo Mendoza	Lucio Ortiz
Gennaro Herrera	

18. That since November 12, 1991, the Respondent has refused to reinstate the employees named above to their former jobs.[3]

19. That since November 12, 1991, the Respondent has refused to make any offer of reinstatement to Efrain Camacena and Avelardo Murillo.[4]

20. That on November 14, 1991, Joseph D'Amiano (a) threatened to reassign employees to more onerous job duties, (b) threatened plant closure, (c) told employees that it would be futile for them to select the Union, (d) threatened not to recall strikers, and (e) threatened to reduce the hours of its employees.

21. That on November 14, 18, and 22, 1991, the Respondent transferred Cuhuatemoc Cuenca, Leovigildo Gomez, Roberto Pena, Albino Diaz, and Agustin Jerez to more onerous jobs and reduced their hours of work.

22. That on November 18, 1991, the Respondent, for discriminatory reasons, disciplined Cuhuatemoc Cuenca, Isidro Ramblas, and Mario Vasquez.

23. That on November 21, 1991, Nicholas Macrina threatened employees with reduced wages.

[1] After the close of the hearing the General Counsel moved to withdraw two allegations which were that Policarpio Mendoza was discriminatorily laid off at the end of December 1991 and that upon his recall in March 1992 he was given a more onerous job and that his benefits were changed. The motion is granted.

[2] It is noted that on November 10 or 11, 1991, the Company sent telegrams to the laid-off employees offering them reinstatement.

[3] The Company did off offer reinstatement to all of the strikers named in par. 17 except for Avelardo Murillo and Efrain Camacena.

[4] The Company contends that both of these individuals were discharged for cause and not for discriminatory reasons.

24. That at the end of November 1991, the Respondent reduced the wage rate of Rodrigo Armengolt.

25. That at the end of November 1991, David D'Amiano threatened not to reinstate employees.

26. That at the beginning of December 1991, Joseph D'Amiano told employees that it would be futile to select the Union.

27. That on December 5, 1991, the Respondent, for discriminatory reasons disciplined Marco Zarate.

28. That on or about December 9, 1991, the Respondent by Joseph D'Amiano orally announced a rule that:

> Discussion between employees concerning the Union on company premises are prohibited.

29. That On or about December 9, 1991, the Respondent, by David D'Amiano implied to employees that it was the Union that was causing their transfer to more onerous jobs.

30. That on or about December 9, 1991, the Respondent, by Joseph D'Amiano threatened continuing reduction in hours and told employees that it would be futile to select the Union.

31. That on or about December 10, 1991, the Respondent by Joseph D'Amiano, (a) created the impression of surveillance, (b) made an implied threat of discharge to an employee, and (c) told employees that it would be futile to select the Union.

32. That on or about December 10, 1991, the Respondent, for discriminatory reasons, transferred Nehemias Alverado to Pathmark and imposed more onerous working conditions on him.

33. That on December 10, 1991 (3 days before the election), the Respondent, for discriminatory reasons, laid off:

Cuhuatemoc Cuenca	Ignacio Landaverde
Leovigildo Gomez	Etelberto Mendoza
Antonio Gonzalez	Mario Mendoza
Alejandrino Guzman	Florencio Moctezuma
Isidro Ramblas	Roberto Pena
Francisco Reyes	Juan Reyes
Mario Vasquez	Pedro Ventura
Marco Zarate	

34. That on December 10, 14, and 16 and an unknown date in December 1991, the Respondent respectively transferred Nehemias Alvarado, Mario Mendoza, and Juan Cantu to more onerous jobs with reduced hours of work.

35. That on December 16, 1991, Joseph D'Amiano threatened employees with continued wage reductions.

36. That on December 21, 1991, the Respondent imposed production quotas on its employes.

37. That on December 21, 1991, David D'Amiano threatened employees with discharge.

38. That at the end of December 1991, the Respondent, for discriminatory reasons laid off Policarpo Mendoza, recalled him on March 2, but transferred him to a more onerous job with different benefits.

39. That on or about February 10, 1992, the Respondent for discriminatory reasons, reduced the piece rate paid for pallet repair work.

40. That in mid-March 1992, the Respondent transferred Leovigildo Gomez to a more burdensome shift and reduced his hours of work.

41. That on March 28, 1992, the Respondent, for discriminatory reasons, refused to cash the paycheck of Mario Mendoza.

42. That at the end of March 1992, the Respondent, for discriminatory reasons, refused to rehire certain of its employees who returned from visits to Mexico.

43. That on April 28, 1992, the Respondent discriminatorily discharged Mario Mendoza.

44. That since April 1992, the Respondent, by David D'Amiano, offered Ignacio Landaverde additional work and promotion to supervisor in order to influence his testimony in this case.

45. That on or about June 1, 1992, the Respondent promised to transfer Nehemias Alverado from Pathmark back to Carteret if he didn't testify against the Company.

46. That on June 18, 1992, the Respondent refused to return rent overpayments and a security deposit to Lucio Ortiz.

47. That on July 17, 1992, the Respondent selected Lucio Ortiz and Albino Diaz for layoff and did so for discriminatory reasons.

48. That on July 17, 1992, the Respondent constructively discharged Nehemias Alvarado who quit because of the onerous and discriminatory assignment given to him in December 1991.

49. That on August 28, 1992, the Respondent for discriminatory reasons, refused to rehire Nehemias Alvarado.

50. That on September 22, 1992, the Respondent laid off Domitilo Sanchez because he gave testimony in this case on September 21, 1991.

As part of the remedy in this case, the General Counsel seeks:

1. A *Gissel* bargaining order.

2. The reimbursement of rent paid by Lucio Ortiz in any amount over $200 per month, since November 1, 1991, and to reduce rent charged to him after that date to the amount charged before that date.

3. An order requiring the Respondent to:

> Notify the Regional Director for Region 22, in writing, within 20 days from the date of the Board's Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

4. A finding that Joseph and David D'Amiano should be held to be personally liable for the alleged violations of the corporations involved in the present cases. As to this contention, I notified that parties that this could more appropriately be dealt with in any compliance stage of this proceeding, assuming that one was required. See the attached Appendix A for my June 1991 Order issued in relation to certain subpoenas served on the Respondent.

On September 4, 1992, the Regional Office obtained in the New Jersey Federal District Court a 10(j) injunction. As this

temporary injunction is supposed to expire on March 4, 1993, the General Counsel requested that this case be given expeditious treatment. I have therefore undertaken to issue this decision with as much dispatch as within my power, given the length of the record, the complexity of the issues and my other work. However, in so doing I have decided to ignore some of the 8(a)(1) allegations of the complaint to the extent that they are marginal or relatively trivial in nature, or are redundant so that they would add nothing to the remedy in this case.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

CONCLUDED FINDINGS

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Nature of the Company's Business and its Supervisory Structure*

The Respondents are related companies with common ownership and control. There is no dispute that Joseph D'Amiano and his son David, are in charge of these companies and determine, among other things, their labor and personnel policies.

Historically the companies have been engaged in two somewhat related business. One involves the repairing of wooden pallets, mainly for supermarkets or other similar kinds of retail establishments. In this respect, the Company, although it does much of this work at its own facility, also provides labor to Pathmark and Rickles at the facilities of those companies. (The employees assigned to work at Pathmark and Rickles are under the supervision of those companies.) This type of work is physical in nature and involves replacing broken wood on a pallet with new wood. The new wood is attached to the old pallet with a staple gun. Employees assigned to repair pallets are paid on a piece rate basis, their earnings depending upon the number of pallets repaired and not on the number of hours worked. In actual practice, the people who have worked on repairing pallets have generally made more money per week than the laborers who did unskilled work work at the Respondents' own facilities.

The other business is the making of wood mulch. This involves the grinding of wood into chips. Much of the wood comes from old and unrepairable pallets. The chips are then watered over a period of time, whereupon they lose nitrogen (thereby making them unsuitable homes for termites), and are sold to such customers as garden centers. In performing this process, the Company receives wood from which garbage is separated, and which is then put into grinders. The Company has used two types of grinders, one type of which are large portable grinders (tub grinders), and the other a very large stationary grinder called the Montgomery Grinder. The Montgomery Grinder, unlike the other grinders, utilizes a conveyer belt, can grind up entire pallets, and using a magnet, can separate out the nails holding the pallets together. Although it appears that the maintenance of the Montgomery Grinder has been a constant hassle, it is far more efficient than the other tub grinders when it is in operation.

For many years the Company had a facility in Woodbridge, New Jersey, where it did both types of operations. However, the Woodbridge Fire Department, sometime in 1988 determined that the Company's operations constituted a fire hazard and obtained from the local court, an order requiring the Company to remove wood and pallets from that facility. Over the next several years, the Fire Department and the Company were in and out of court regarding this problem while the Company sought and eventually obtained a new location to conduct its operations in Carteret, New Jersey. The final court order was dated November 22, 1991. That ordered the Company to remove its wood chips by November 22, 1991, and vacate the Woodbridge facility by December 1, 1991.

In the meantime, the Company transferred most of its employees and operations from Woodbridge to Carteret during the summer of 1991. It transferred most of its employees to Carteret by November 1, 1991, and completely vacated the Woodbridge yard at some time in December 1991.

In September 1991 one of the employees ran a forklift machine into the Montgomery Grinder and caused extensive electrical damage to it. (This employee was then discharged.) Repairs were carried out by two separate companies. According to Carl Gurney, his company (Gurney Electric), was involved in the repair of the Montgomery Grinder which was completed in November 1991. He testified that until the machine was started up again for a test run in about November, it was not in operation. He also testified that he was again called in to disassemble the Montgomery sometime in December 1991. As will be evident later on, the timing of the damage and repair of the Montgomery Grinder will become important when considering the layoffs that occurred on November 1, 1991.

There was much testimony as to the supervisory structure of the Respondents. In this regard, the General Counsel and the Charging Party contend that the following named individuals were, at various times, supervisors within the meaning of the Act.

Nicholas Macrina	George Salerno
Robert Buglioli Jr.	Sacramento Rojas
Thomas Kenny	Michael Becker
Anthony Fabrizzio	

The Respondent, although conceding that Nicholas Macrina was a supervisor, contends that the others were not. It contends that the supervision of the employees at either facility was carried out solely by Joseph and David D'Amiano, the two owners.[5]

It is noted that both the Woodbridge and Carteret yards are large areas, where somewhere in the neighborhood of 70 to 90 people were employed at any given time. They were spread out physically and did a variety of operations, albeit many of which were unskilled and routine.

Many employee witnesses testified in rather conclusory terms that the persons named above told them what to do,

[5] Joseph D'Amiano's wife, Lucy, took care of the bookkeeping and worked in the office.

gave them orders and could let them leave early. By itself this testimony was not particularly persuasive.

Joseph D'Amiano in a pretrial affidavit made the following statements constituting admissions pursuant to Rule 801(d)(2) of the Federal Rules of Evidence:

> 10. Thomas Kenny unloaded trailers in wood recycling and ran machines. I would tell him if I wanted say 2, 7 and 9 unloaded. He would either do it himself or have others help him. I would give him the individuals to help him. He would show the employees what to do. The employees would have to listen to what he said. A lot of guys would complain about unloading trucks, if they did not follow Kenny's instructions to do so I would just move them to doing another job.
>
> 11. Kenny was on salary, he did not punch a time clock. I have told the employees that they had to listen to what Kenny said, because he knows what has to be done. (I can't give instructions to 15 guys.)
>
> . . . .
>
> 17. Buglioli works on both the pallet and recycling cases. In the morning I tell him what I want done and he does it. I tell the employees which place they are to work in. I tell Buglioli who is going to be in the switcher, which trailer to get done first. He matches what the employees do, and makes sure they do their jobs. He also runs the machinery like the loaders. I have told the employees they have to listen to what Buglioli says.
>
> . . . .
>
> 20. If someone is not doing a job well Buglioli cannot send them hone early, he has to come talk to me, and then I go and talk to the individual.
>
> 21. Sacramento Rojas drivers a forklift in both the pallet area and in recycling. He loads and unloads trucks.
>
> 22. Either I, Buglioli, Rojas, David, Anthony Fabrizzio Anthony Salerno, or Macrina count the rows in the pallet area when they are full and then at the end of the day to see how many pallets come out. Anthony Salerno checks the quality, as does Robert Washington, Buglioli and Rojas. (Customer also letter from when pallets are going badly.)
>
> 23. Any one of the above listed individuals can tell me when the pallets are not being repaired properly. I must put the pallet back for the person to repair again without being paid for it.
>
> . . . .
>
> 28. George Salerno works a forklift and runs machines. If I had special job I would tell him to take some guys and do it. The employees know that they have to listen to him, because I tell them right then and there.

In view of the above and the record as a whole, I conclude that Nicholas Macrina, Thomas Kenny, Robert Buglioli, and George Salerno could, using independent judgement, responsibly direct the work of employees, and could assign and reassign them to various tasks during the course of a regular work day. Accordingly it is my opinion that they were supervisors within the meaning of Section 2(11) of the Act.

On the other hand, the testimony of all the witnesses does not convince me that Anthony Salerno, Sacramento Rojas, or Michael Becker were supervisors. In the case of Rojas, the testimony shows that his principle job was to operate a forklift in the pallet repair area of the yard. Each day he used the forklift to bring pallets in rows to the area where the pallet repair employees were to do their work. This I do not consider to be equivalent to assigning work. Also, he was responsible for counting the finished pallets at the end of the day, and checked whether the pallets were suitable for shipment. Michael Becker's main job was to operate heavy machines such as bulldozers. At most, the General Counsel's witnesses such as Nehemias Alvarado, testified that Becker was a machine operator who intermittently filled in to supervise when the other foremen were not around. See *Gordon Mills, Inc*., 145 NLRB 771, 775 (1963). Finally, Alvarado testified that Anthony Salerno was an older worker who operated a hi-lo and who worked on a part-time basis.

As to Anthony Fabrizzio, the General Counsel contends that this person, who used to be a truckdriver, only became a supervisor in January 1992 when he took over the position vacated by Macrina. The testimony as to this person is sparse and indicates that he was moved to the office where he relayed instructions from David D'Amiano to the Company's truckdrivers and other employees. The Company contends that Fabrizzio was merely a dispatcher and in my opinion there is insufficient evidence to show that he was a supervisor.

B. *The Union's Majority Status*

The Union by its organizer, Rhina Molina, met with employees of the Company during October and early November 1991. During that time, she obtained 41 authorization cards from employees.[6] Most, but not all of the employees who signed union cards were Mexicans who worked at the Respondent pursuant to Immigration Green Cards. The union authorization cards were in English, not Spanish, and in some instances the employees could not read or understand the language on the cards.[7] The testimony revealed however, that Molina, contemporaneously with asking employees to sign these cards, explained the benefits that the Union hoped to be able to achieve; stated that the Union would ask the Employer for recognition; and told employees that if recognition was denied the Union would seek to have an election conducted by the National Labor Relations Board. Although

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[6] One card dated November 2, 1991, has what purports to be the signature of Valentin Rojas. Rojas testified that he was at an apartment where Molina solicited a group of employees to sign cards and that at some point he told another former employee of the Company to sign a card. Assuming this to be so, it seems that this other person must have assumed that Rojas was asking him to sign Rojas' name and did so. As it would appear that the signature on this card was not that of Rojas and as it also appears that it was signed under the mistaken assumption by someone else that Rojas authorized his signature, I shall not count this card toward the Union's majority status. I note that this was the only incident of its kind and there was no other evidence which would tend to show any irregularities in the manner in which the Union obtained employee signatures.

[7] The cards state inter alia:

> I _____, now employed by _____ hereby apply for membership in the Local 132-98-102 ILGWU and agree to be bound by its Constitution and By Laws. I hereby designate and authorize the Local 132-98-102, ILGWU, its affiliates and its representatives, to act exclusively as my agent and representative for the purpose of collective bargaining.

employees were told that the cards might be used for the purpose of obtaining an NLRB election, the evidence does not suggest that employees were told that this was the only purpose of the cards.

In my opinion the authorization cards signed by the employees in this case, except for the one signed by Valentin Rojas, are valid and would support a bargaining order assuming that a majority of the employees signed the cards and that the other elements necessary for granting such an order were present. These 40 cards on their face, do not suggest that they are for the purpose of obtaining an NLRB election. Although some employees could not read the cards, the cards were translated to many of those who could not read English and the employees were told in groups, in effect, that the cards would be used to demand recognition or to ask for an election if the Union's demand for recognition was rejected by the Employer. In this circumstances it is concluded that the Union has established the validity of the cards. See *Cumberland Shoe*, 144 NLRB 1268 (1963). Cf. *Nissan Research & Development*, 296 NLRB 598 (1989). Moreover, single purpose cards which authorize a union to represent the card signer are valid, notwithstanding representations that such cards may be used for the purpose of obtaining an NLRB election. See *Levi Strauss & Co.*, 172 NLRB 732 (1968), enfd. sub nom *Southwest Regional Joint Board v. NLRB*, 441 F.2d 1027 (D.C. Cir. 1970).

The Union made its demand for recognition on October 21, 1991, and filed the petition for an election on the same day, when its demand was declined.

The Respondent's payroll records[8] for the pay period for the week ending November 3, 1991, shows that exclusive of the D'Amianos, the office and clerical workers[9] and Nicholas Macrena (conceded by the Employer to be a supervisor), there were 73 employees who were paid for working at the Company during that particular week. These were:

Name	*Job*	*Location*	*Signed Card*	*November 1, 1991 Layoff*
Alvarado, N.	Yard driver	Yard	Yes	Yes
Armengolt, R.	Recycling	Yard	Yes	Yes
Astudillo, Teofilo	Pallets	Rickles	Yes	No
Barrett Donald	Mechanic	Yard	No	No
Becker, Michael	Eqpt operator	Yard	No	No
Brendel David	Truckdriver	Yard	No	No
Brosky, Robert	Truckdriver	Yard	No	No
Camacena, Efrain	Pallets	Yard	Yes	No
Cantu, Juan	Pallets	Yard	Yes	Yes
Carrasco, Divino	Pallets	Pathmark	Yes	No
Cervantes, Tomas	Pallets	Pathmark	Yes	No
Chwialkowski, Jan	Eqpt operator	Yard	No	No
Cimilluca, Michael	Machine oper.	Yard	No	No
Contreras, A.	Recycling	Yard	Yes	Yes
Cuenca, C.	Recycling	Yard	Yes	Yes
Diaz, Albino	Recycling	Yard	Yes	Yes
DeMarco, Peter	Truckdriver	Yard	No	No
Di Dolci, Alan	Truckdriver	Yard	No	No
Duffy, Martin	Eqpt operator	Yard	No	No
Dutkowski, Alfred	Truckdriver	Yard	No	No
Fabrizzio, Anthony	Truckdriver	Yard	No	No
Flores, Bonificio	Pallets	Pathmark	No	No
Galves, Hector	Stripper	Yard	Yes	Yes
Garcia, Manuel	Saw	Yard	Yes	No[10]
Gardi, Gregory	Truckdriver	Yard	No	No
Gatto, Anthony	Mechanic	Yard	No	No
Geyer, Mark	Truckdriver	Yard	No	No
Gomez, Leovigildo	Recycling	Yard	Yes	Yes
Gonzalez, Antonio	Recycling	Yard	Yes	Yes
Govan, William	Truckdriver	Yard	No	No
Guzman, Alejandrino	Recycling	Yard	Yes	Yes
Guzman, Adelfo	Pallets	Pathmark	Yes	No
Herrera, Sarabando	Recycling	Yard	Yes	Yes
Herrera, Gennaro	Pallets	Pathmark	Yes	No
Hill, Thomas	Truckdriver	Yard	No	No
Jerez, Agustin	Recycling	Yard	Yes	Yes

[8] In 1991 and 1992 the Respondent kept two different payroll registers, one for Dauman Pallet and the other for Dauman Recycling Inc. These payroll registers were prepared by an outside company, Automatic Data Processing from information phoned in by Lucy D'Amiano.

[9] These were Michael Blancato, the controller, Ann Marie Rufolo, Brenda Williams, and Jennifer Kopp.

[10] Manual Garcia although not laid off on November 1, was laid off on November 4, 1991.

Name	*Job*	*Location*	*Signed Card*	*November 1, 1991 Layoff*
Kanard, John	Truckdriver	Yard	No	No
Kiefer, Brian	Laborer	Yard	No	No
Kiefer, Walter	Truckdriver	Yard	No	No
Landaverde, Ignacio	Recycling	Yard	Yes	Yes
Layton, John	Mechanic	Yard	No	No
Mendoza, Mario	Pallets	Yard	Yes	No
Mendoza, Policarpo	Recycling	Yard	Yes	Yes
Mendoza, Etelberto	Pallets	Yard	Yes	Yes
Moctezuma, F.	Pallets	Yard	Yes	Yes
Moore, Chris	Recycling	Yard	No	No
Mullen, Lloyd	Truckdriver	Yard	No	No
Murchison, Germaine	Truckdriver	Yard	No	No
Murchison, Eugene	Saw-Recyling	Yard	No	No
Murillo, Alverado	Pallets	Pathmark	Yes	No
Ortiz, Lucio	Pallets	Pathmark	Yes	No
Paz, Jose Luis	Recycling	Yard	Yes	Yes
Pena, Roberto	Recycling	Yard	Yes	Yes
Ponce, Jose	Recycling	Yard	Yes	Yes
Porciello, V.	Mechanic	Yard	No	No
Poultney, David	Pallets	Yard	No	No
Ramblas, Isidro	Pallets	Yard	Yes	Yes
Reyes, Francisco	Pallets	Yard	Yes[11]	No
Reyes, Juan	Pallets	Yard	Yes	No
Rojas, Sacramento	Forklift	Yard	No	No
Rojas, Valentin	Pallets	Pathmark	No[12]	No
Rowley, Peter	Mechanic	Yard	No	No
Sanchez, Domitilo	Recycling	Yard	Yes	No
Sanchez, Pedro	Recycling	Yard	Yes	No
Sanchez, Jesus	Recycling	Yard	No	No
Sandberg, Herbert	Truckdriver	Yard	No	No
Smith, Daniel	Gofer	Yard	No	No
Thompson, Edward	Truckdriver	Yard	No	No
Trujillo, Juan	Eqpt operator	Yard	Yes	No
Vasilev, Done	Truckdriver	Yard	No	No
Vasquez, Mario	Pallets	Yard	Yes	Yes
Ventura, Pedro	Recycling	Yard	Yes	Yes
Zarate, Marco	Recycling	Yard	Yes	Yes

The General Counsel concedes in its brief that Lee Roy Holmes should be part of the unit even though he did not work during the payroll period ending November 3. They concede that Holmes was a regular part-time employee at this time. Holmes did not sign a union card.

There was a card signed by one Acasio Galindo, who although not appearing on the above payroll, did appear on the preceding payroll and had worked at the Company since January 1989. Galindo testified that after signing his card, he received permission from David D'Amiano to go to Mexico for 2 months starting in late October 1991. Galindo therefore was not actually working at the Company when the layoffs occurred on November 1, 1991, and he did not return from Mexico until April 1992. Since Galindo was granted permission to leave on essentially what could be called a leave of absence, I shall conclude that he was an employee with a reasonable expectancy of return as of pay period ending November 3, 1991. Accordingly, I conclude that his card should be counted toward the Union's majority status.

There also was a card signed by Alvaro Ortiz who also was listed on the ''*Excelsior*'' list as an eligible voter.[13] Although his name does not appear on the payroll records for the week ending November 3, 1991, David D'Amiano testi-

[11] The signature on the card is that of Francisco Reyes Cortez who is the same person as the person listed on the company payroll as Francisco Reyes.

[12] As noted above, Valentin, Rojas testified that he did not sign a card.

[13] The fact that the company puts a person's name on what is called an ''*Excelsior* list'' neither means that he is an eligible voter or that he should be counted as part of the appropriate unit at a time relevant for ascertaining majority status in a ''*Gissel*'' type of an 8(a)(5) case. Pursuant to a case called *Excelsior Underwear*, 156 NLRB 1236 (1966), an employer prior to a Board conducted election is required to turn over to the Board for distribution to a union, a list of the names and addresses of those employees who might be eligible voters. The purpose of this rule is to allow the union to contact those people for the upcoming election and the rule does not purport to be binding on any party regarding whether any particular person on the list (or left off the list), will ultimately be considered an eligible voter. That is, either party may challenge the eligibility of any person whose name has been placed by the employer on the *Excelsior* list and either party may also contend that persons left off the list should be allowed to vote. For example, the Company put a person named Jack Lambly on the *Excelsior* list and asserted for a while that he was an eligible voter. However, as the hearing progressed and as the General Counsel had access to the Company's books and records, the Respondent ultimately conceded that it never employed Lambly.

fied that he was among the people employed in the recycling area as of November 1, 1991. I therefore shall count his card toward the Union's majority status.

Therefore as of the week ending November 3, 1991, the Union had obtained 40 validly signed authorization cards.

One of the people who worked during the week ending November 3, 1991, was a person named Vasilev Done. David D'Amiano testified that this person had his own business and that he worked for the Respondent on an irregular and infrequent basis as a truckdriver. It therefore is my opinion that Done should not be counted in the unit. Therefore, in the General Counsel's view, the unit at that time consisted of 73 employees.

The Respondent asserts in its brief that there were between 83 and 85 employees in the bargaining unit as of the week ending November 3, 1991. He did not, however, specify the names of all of the additional employees who should be included. Nevertheless, based on the testimony of David D'Amiano and the ''*Excelsior*'' list I would imagine that his list would add the following individuals.

Alex Barowski. Barowski was hired during the week ending July 23, 1991, and worked until some time in September 1991. He is listed on the Dauman Recycling payroll in department 200 which is the mechanic's department. Despite Respondent's contention that he was temporarily laid off, Barowski did not return until the week ending June 28, 1992, and he worked from 4 to 9 hours per week thereafter. During his 9-month absence, the Dauman Recycling payroll records show a number of people hired into department 200 (such as John Layton and Frank Kopp), thereby indicating that new people were hired before Barowski was recalled. This is hardly consistent with a contention that he was temporarily laid off, and I find that he had no reasonable expectation of recall as of the time he was laid off in September 1991. *Monroe Auto Equipment*, 273 NLRB 103, 105 (1984).

Donald Barrett Jr., David D'Amiano testified that as of November 1, 1991, there was a Donald Barrett Sr., who worked as a truckdriver and a Donald Barrett Jr. who worked as a mechanic. There is no dispute that Donald Barrett Sr. was in the unit at all relevant times. However, the Autopay Master Control for Dauman Recycling (G.C. Exh. 53) indicates that Donald Barrett Jr. was hired on December 15, 1991, and the payroll records of Dauman Recycling shows that the last time he worked was during the week ending February 10, 1991, where he is listed in department 700. The payroll records for Dauman Recycling for 1991 and through August 1992 are in evidence as Respondent's Exhibit 12 and Barrett Jr. does not appear again. Accordingly, I conclude that he was not in the unit at any relevant time.

Thomas Kenny. As described above I have concluded that Kenny was a supervisor within the meaning of the Act and therefore he was not part of the bargaining unit during any relevant time. It is also noted that Thomas Kenny had an accident in December 1990 and was out on disability until some time in January 1992.

Robert Buglioli. Having concluded that Robert Buglioli was a supervisor within the meaning of the Act, he was not part of the bargaining unit at any relevant time. Also, the yearend Auto Pay Master Control for Dauman Pallet (G.C. Exh. 54), indicates that he was hired, on December 2, 1991, and therefore was not employed either at the beginning of November 1991 or on the payroll eligibility date for the election.

George Salerno. Having found that George Salerno was a supervisor within the meaning of the Act, he was not part of the bargaining unit at any relevant time.

William Buglioli. David D'Amiano testified that there was a William Buglioli who was employed as of November 1, 1991. He could not, however, remember what kind of work he did and the payroll records do not record that any such an individual was ever employed during 1991 or 1992.

David Carracino. David D'Amiano testified that this person, although laid off in the summer of 1991, was an employee in the recycling department as of November 1, 1991. The yearend record for Dauman Pallet (G.C. Exh. 54) shows that such a person was hired at $10 per hour on June 6, 1991. However, an examination of the payroll records do not show this person as having worked at any time during 1991. If he ever worked, he clearly was quickly released.

William Curry. Curry was a mechanic hired on December 15, 1989. His name appears on the Dauman Recycling payroll which shows that he was laid off during the week ending July 14, 1991, and that he remained off that payroll until the week ending December 1, 1991, when he briefly returned to work for 2 weeks at 6 hours per week. As far as the records show, he did not return to work on a full-time basis until January 23, 1992. There is insufficient evidence in this record that he was temporarily laid off, that he was on a leave of absence, that he was on a disability leave or that he had, at the time he left in July 1991 any reasonable expectation of recall. I therefore shall not count him as part of the unit.

Galingo. According to David D'Amiano there was an employee named Galingo, who he believes left in the summer of 1991. This name does not appear on any payroll records (unless he is mistaking the name for Acasio Galindo) and whoever he is, he is not counted as part of the unit.

James Gatto. General Counsel's Exhibit 54 (the Autopay Master control for Dauman Pallet for the year ending 1991) shows that a James Gatto was hired for the Dauman Pallet payroll (in department 500) on March 27, 1991. The records show that he stopped working during the week ending September 22, 1991, and has not returned. (G.C. Exg. 55 is the Autopay Master control record for the period from Jan. 1 to Aug. 23, 1992. It combines the payroll records for Dauman Pallet and Dauman Recycling and indicates the names, the addresses and the hiring dates of all persons employed at any time during that period of time.) It does not show that James Gatto worked at any time during 1992. Therefore although David D'Amiano asserted that he was an employee as of November 1991, I conclude that he was not.

Vincent Gatto. The Dauman Pallet payroll records show that Vincent Gatto was a part-time laborer (department 700) who was hired on April 8, 1991. The records show that he last worked during the week ending September 29, 1991. General Counsel's Exhibit 55 indicates that he was rehired on July 13, 1992. As the evidence does not demonstrate that he had any reasonable expectation of recall when he left in September 1991, I shall not count Vincent Gatto in the unit.

Kenneth Gilliam. General Counsel's Exhibit 55 shows that a Gilliam was hired on August 10, 1991. The records show that he was a truckdriver in department 500 on the Dauman Recycling payroll; that he left during the week ending Sep-

tember 29, 1991, and returned to work on a full-time basis, during the week ending December 8, 1991. If the records had shown that Gilliam had been a long term employee, I would have concluded that he was temporarily laid off in September 1991. However, as he had been hired in August 1991, and there is no evidence to show that he was told in September that his lay off was temporary, I conclude that he should not be counted in the unit.

James Govan. General Counsel's Exhibit 55 shows that James Govan was hired on April 7, 1989, and worked as a truckdriver in department 500 on the Dauman Recycling payroll. He worked regularly until the week ending October 27, 1991, and returned to work during the week ending November 24, 1991. Notwithstanding the fact that his name did not appear on either of the payroll's for the week ending November 3, 1991, it seems to me that he was a longtime and regular employee who was temporarily absent during early November 1991. I shall therefore include him in the unit.

Richard Menkin. Although General Counsel's Exhibit 54, the Autopay Master Control for Dauman Pallet; year ending 1991, shows a Richard Menkin being hired on May 9, 1991, I could not find him listed on either the Dauman Pallet or Dauman Recycling weekly payroll records. Since this person's employment has not been sufficiently established, I shall not count him as part of the unit. (During the hearing the Respondent conceded that the challenge to his vote should be sustained.)

Maurice Murchison. General Counsel's Exhibit 54 shows that Maurice Murchison was hired on March 12, 1991, and worked on the Dauman Pallet payroll in department 700 as a laborer. Prior to November 1991, he last worked during the week ending May 2, 1991. He returned to work during the week ending November 17, 1991, at a time that the Company was refusing to recall all the strikers, and he last worked for 24 hours during the week ending December 15, 1992. As there is no evidence to show that at the time he left in May 1992 that his leaving was temporary in nature, I shall not count him as part of the unit. Indeed, it looks to me like his rehire in November 1991 was intended by the Company to stack the unit in its favor pending the holding of an election. (G.C. Exh. 55 shows that he was not employed at any time during 1992.)

Manuel Rivera. General Counsel's Exhibit 54 shows that Manuel Rivera was hired on April 7, 1989. He appears on the Dauman Pallet payroll in department 600 (pallet repair) and that record shows that he last worked during the week ending July 14, 1991. According to the 1992 Autopay Master Control record (G.C. Exh. 55) Rivera was rehired on April 3, 1992. Since there was no evidence to show that his leaving in July 1991 was considered to be temporary, I conclude that he was not part of the unit at any relevant time.

Anthony Salerno. General Counsel's Exhibit 53 shows that Anthony Salerno was originally hired on April 7, 1991, and General Counsel's Exhibit 55 shows that he was rehired on September 26, 1991. He appears on the Dauman Pallet payroll record in department 300, which is entitled ''supervisors.'' Although he does not appear on the payroll record for the week ending November 3, 1991, he does appear on payroll records immediately before and after that date. There is no question but that he was employed as of November 3, 1991, and I have previously concluded that despite the nomenclature in the payroll records, he did not have statutory supervisory authority. I therefore shall count him in the unit.

Owen Sharkey. General Counsel's Exhibits 54 and 55 indicates that Owen Sharkey was hired on June 11, 1991, and laid off during the week ending October 6, 1991. He was listed on the Dauman Pallet payroll as a truckdriver in department 500. That payroll indicates that he returned to work as a part-time employee during the week ending December 1, and left again during the week ending December 16, 1991. (I.e., right after the election.) The payroll records do not show that he ever worked for the Company again. In my opinion, the evidence tends to show that he was laid off without expectation of recall in early October 1991. I shall therefore not count him as part of the unit.

Jose Vega. General Counsel's Exhibit 53 shows a Jose Vega hired on May 6, 1991. He appears on the Dauman Recycling payroll in department 700 (laborers) and the last time he ever worked at the Company was during the week ending July 28, 1991. I shall therefore not count him as part of the unit.

Daniel Zrodsky. General Counsel's Exhibit 54 shows that Zrodsky was hired on March 12, 1991. He appears on the Dauman Pallet payroll in the department 700 (laborers). He last appears as having worked during the week ending June 2, 1991, and there is no indication that he ever returned. I shall not count his as part of the unit. (As noted above, the Company conceded that Zrodsky was not an eligible voter.)

Michael Murray. General Counsel's Exhibit 53 shows that Murray was hired on June 4, 1991. He appears on the Dauman Recycling payroll during 1991 as a truckdriver in department 500. The records show that he left the Company during the week ending October 20, 1991, and reappeared for a total of 17.5 hours during the week ending December 15, 1991. He thereafter does not appear on the payroll until the pay period ending March 1, 1992, when he appears in department 500 as a heavy machine operator. In the absence of any meaningful testimony regarding Murray's status, it seems to me that he was laid off, without expectancy of recall during the week ending October 20, 1991, and only recalled to full-time duty during the week ending March 1, 1992, at a new job. His brief appearance on the December 15, 1991 payroll does not alter my opinion that he had been permanently laid off, and this aberration indicates merely an attempt by the Respondent to claim him as an eligible voter. Accordingly, I shall not count Murray as part of the unit as of any relevant time.

In light of the above, it is my opinion that the bargaining unit as of November 3, 1991, consisted of 77 employees, of which 40 signed valid authorization cards.[14]

[14] Subsequent to the close of the hearing, the Employer's counsel, on February 4, 1993, wrote me a letter indicating that his client had advised him that the person on its payroll, Etelberto Mendoza, was not the real Mendoza but another person using that name in order to avoid the prohibition against the hiring of undocumented aliens. He therefore asserts that the union authorization card signed by this person masquerading as Etelberto Mendoza should not be counted because he committed a fraud.

Whatever the status of Mendoza, the employer here has not demonstrated that the evidence is newly discovered within the meaning of Sec. 102.48(d)(1) of the Board's Rules and Regulations. Moreover, he does not contest that there was a real person who using this name was employed by the Company and who signed a union card.

C. *The November 1, 1991 Layoffs*

Mario Mendoza testified that on November 1, 1991, he was told by Peter DeMarco that he and David D'Amiano were with Jose Trujillo the night before and that Trujillo had given them the names of the people that signed union cards.[15] According to Mendoza, DeMarco said that all those people were going to be fired.

In much the same vein, Nehemias Alvarado testified that on November 1, 1991, DeMarco told him that he and David D'Amiano had learned from Trujillo, on the previous night, that Alvarado and the other Mexican employees had signed union cards. He testified that DeMarco said that David was going to fire all the people who signed the cards.

The facts in this case show that Peter DeMarco was a nonsupervisory truckdriver who, on occasion, went out for dinner with David D'Amiano. (Sort of like Sancho Panza to Don Quixote.) Therefore, unless the evidence shows that DeMarco, in this particular situation, participated with David D'Amiano in an illegal plan to discriminate against the employees, the remarks attributed to him would be heresay and inadmissible. As the evidence on this is too ambiguous for my taste, I shall not rely on this testimony to buttress my conclusion that the November 1, 1991 layoffs were motivated by discriminatory reasons.

As noted above, the Respondent on November 1, 1991, laid off 24 employees, and added a 25th on November 4. Most of these employees were of Mexican descent and all signed union authorization cards. As this occurred about 1 week after the Union filed its petition for an election, the timing of the layoff, by itself, strongly evidences a discriminatory intent. *Greco & Haines, Inc.*, 306 NLRB 837 (1992). Pursuant to *Wright Line*, 251 NLRB 1083 (1980), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as the General Counsel has made out a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against employees, the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

The Respondent by David and Joseph D'Amiano have set forth at various times alternative and sometimes contradictory reasons for their reasons for November 1 layoffs.[16]

At one point in the trial, David D'Amiano testified that the reasons for the November 1 layoffs were because (1) the Montgomery Grinder was turned off which meant that all of people who worked in association with that machine were no longer needed; and (2) business was slow. He testified that the main reason was that the grinder was turned off because a court, at the request of the local fire department, had ordered the Company to move out of Woodbridge. Nevertheless, at another point in his testimony, David D'Amiano testified that the Montgomery Grinder had been turned off for repairs back in September 1991 which in fact was the case as confirmed by the testimony of Carl Gurney. Indeed, the testimony of Gurney, of Joseph D'Amiano and of some of the employees who, like Domitilo Sanchez, worked at Woodbridge on November 4, or other employees who picketed outside the Woodbridge yard in early November 1991, convinces me that the Montgomery Grinder had been repaired shortly before November 1, 1991, and that it was operated after that date and until sometime in December when it was disassembled preparatory to moving it to Carteret. (In fact, Joseph D'Amiano conceded that the Montgomery Grinder may have been used after Nov. 1, 1991.)[17]

Therefore, it seems clear to me that the turning off of the Montgomery Grinder, which actually occurred in September 1991, could not have been the reason for the November 1 layoffs, particularly as the evidence shows that it was turned back on after that date and that the Company used a contractor, Robert Chrisman, to furnish workers to do work that had been done by the Respondent's employees who worked at the Woodbridge yard in conjunction with the Montgomery Grinder.[18] Also there was credible testimony by employee Mario Mendoza that during the time that from November 4, to the recall of the laid-off employees, he observed, while working at the Carteret yard five new employees working at that location. One of these was Maurice Murchison who had previously been discharged in the spring of 1991 and the others, according to Mario Mendoza were completely new to him.

Based on the above, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by layoff of the 25 employees on November 1, 1991.

There is nothing in the Act which exempts undocumented aliens from the definition of an employee. *Sure Tan, Inc. v. NLRB*, 467 U.S. 116 (1984). Therefore, even assuming that the Employer's assertion is correct, I don't believe it has any legal consequence in terms of whether the Union represented a majority of the workers actually employed by the Company as of November 1, 1991.

[15] According to Mendoza he went over to Trujillo's house to solicit him to sign a union card.

[16] I must say here that on demeanor grounds I was not favorably impressed with the credibility of either David or Joseph D'Amiano. Both at varying times, seemed to be evasive and belligerent.

[17] Although David D'Amiano stated that the principle reason for the November 1 layoffs was the shutdown of the Montgomery Grinder (used in the recycling operation), Joseph D'Amiano, in a pretrial affidavit (G.C. Exh. 28), gave a completely different explanation. He stated:

> In November 1991, we had a lot of pallets on hand in inventory, and we could not afford to pay the employees to repair more pallets. We had laid off employees in the past from the pallet repair side when demand for pallets was reduced and inventory was high. The individuals we laid off on November 1, 1991 were only from the pallet repair side; everyone else was reduced in hours or alternated days: drivers, fork lift operators and the people who worked recycling.

[18] I reach this conclusion based on the evidence taken during the course of the hearing. In this regard, I rejected the General Counsels' motion to reopen the record so as to enable them to produce supposedly newly discovered evidence of the Company's continued operation of the Montgomery Grinder at Woodbridge in November and December 1991. My order on that motion is attached hereto as Appendix B.

D. *The Strike*

Between November 5 and 11, 1991, some of the other employees who were not laid off, went out on strike. They were:

Name	*Job & Location*
Avelardo Murillo	Pallets/Pathmark
Efrain Camacena	Pallets/Carteret
Francisco Reyes	Pallets/Carteret
Gennaro Herrera[19]	Pallets/Pathmark
Juan Reyes	Recycling/Carteret
Lucio Ortiz[20]	Pallets/Pathmark
Mario Mendoza[21]	Pallets/Carteret
Policarpo Mendoza	Recycling/Carteret
Tomas Cervantes	Pallets/Pathmark

As this strike was caused, at least in part by the November 1 layoffs, which I have concluded to have been illegally motivated, I find that the strike was an unfair labor practice strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Drivers Local 662 v. NLRB*, 302 F.2d 908 (D.C. Cir. 1962); *Northern Wire Corp*., 291 NLRB 727 (1988); *Workroom for Designers*, 274 NLRB 840, 856 (1985).

E. *The Meeting at the Diner*

Nehemias Alvarado and Ignacio Landaverde testified that on or about November 7, 1991, they were called by David D'Amiano and asked to attend a meeting with him at a diner. They testified that when they arrived at the diner, David D'Amiano was accompanied by Peter DeMarco. According to Alvarado and Landaverde, David D'Amiano said that they should not get involved with the Union and offered a wage increase to $10 per hour plus holiday and vacation benefits. They state that David D'Amiano, at one point during the meeting, called his father on a cellular phone and repeated the offer he had made to the two employees. At this point, according to the employees, Alvarado got on the phone and spoke to Joseph D'Amiano. While Alvarado testified that Joseph D'Amiano said that he should leave the Union and accept his son's offer, Landaverde testified that when Alvarado got off the phone, he said that Joseph D'Amiano had told him that he could not offer anything, whereupon David said that his father called the shots. According to Landaverde, he received the next day, a phone call from David D'Amiano who said that his father had agreed to the $10 per hour but not to any other benefits. He states that they he, Alvarado, David, and Joseph D'Amiano conducted a conference call confirming that offer.

David D'Amiano testified that he met with Alvarado and Landaverde (both of whom he described as very good workers) at the diner and that he expressed shock that there was a strike (which Alvarado and Landaverde had joined). David D'Amiano states however, that it was Alvarado who demanded a raise to $10 per hour, plus holiday, vacation, and medical benefits. He states that they said that if these demands were met they would cross the picket line inasmuch as they did not care about the Mexicans. According to David D'Amiano, he put Alvarado on the phone with his father who said that if they wanted to return to work they could, but that he would not offer them anything. According to David D'Amiano, he may have called them back a day or two later, but he cannot recall if he did.

Based on the record as a whole and on demeanor grounds, it is my opinion that David D'Amiano, on or about November 7, 1991, offered increased wages and benefits to Alvarado and Landaverde in an attempt to get these two highly regarded workers to abandon the strike and return to work. I also conclude that this offer was immediately vacated by Joseph D'Amiano during his phone conversation with Alvarado, but that the wage increase portion of the offer was reinstated on the following day during the conference phone call. (In this respect, I think that Alvarado has telescoped the two phone conversations into one.) In this respect, therefore, I conclude that the Respondent has violated Section 8(a)(1) by promising a wage increase to employees in order to induce them to refrain from engaging in union and protected concerted activity.

F. *Lucio Ortiz' Rent*

Lucio Ortiz who signed a union card on October 5, 1991, and worked at Pathmark repairing pallets was not laid off on November 1, 1991. He did, however, go out on strike on or about November 11, 1991. Before going out on strike, his union activities were unremarkable. Ortiz testified that on or about November 8, 1991 (*before he went out on strike*), David D'Amiano told him that his rent was being increased from $200 to $600 a month because Ortiz had a woman and a child living with him in an apartment owned by David D'Amiano. Ortiz also testified and David D'Amiano denied that the latter said that the rent was increased because Ortiz was a member of the Union. Thereafter, a compromise was reached and the rent was raised to $300 a month.

David D'Amiano owns a number of apartment houses and he lets apartments to his employees, many of whom live together as their families are in Mexico. He testified that he charges $200 per month per person rather than charging rent by the apartment. D'Amiano testified that in the case of Ortiz, he lived with two other men in the apartment, each of whom was charged $200 per month. D'Amiano states that after the two other men moved out and he discovered that Ortiz's brought in his ''family,'' he applied the same rule and sought to charge Ortiz $200 for each person in the apartment.

The evidence appears to show that employees leasing the apartments owned by David D'Amiano have been charged $200 per person, this being a consistent practice. For example, the Dauman Pallet payroll records (R. Exh. 13) show that Sacramento Rojas had $200 deducted each month for rent. As such, it seems to me that the General Counsel has not sufficiently demonstrated that the increase in Ortiz' rent was caused by discriminatory reasons and I shall recommend that this allegation be dismissed.

In June 1992, the utility company turned off the electricity and gas. When Ortiz asked if he had sold the building, David D'Amiano said no but that he wanted Ortiz to pay for the utilities. Ortiz testified that about 2 weeks later, the fire department threw the tenants out of the building whereupon he

[19] Herrera testified that he did not join the strike until about a week after it began.

[20] Lucio Ortiz testified that he joined the strike on November 11, 1991.

[21] Mario Mendoza testified that he joined the strike on November 6, 1991.

told David that he was vacating the apartment and asked David for the return of the rent he had paid for July 1992 and the return of the deposit he had given in July 1991. He states that D'Amiano promised to return $250 of the rent but not the deposit. He also testified that he never received any of the money.

The question here is whether this later dispute was motivated by Ortiz' union activities or was simply a continuation of the former dispute about how much rent he should pay for the apartment. On balance, I am pursuaded that David D'Amiano's refusal to return the deposit or the remainder of the July rent money was consistent with his contention that the rent for these apartments was $200 per month per person; that notwithstanding his earlier compromise with Ortiz at $300 per month, this was David D'Amiano's way of squeezing out a few extra bucks in the rent dispute.

G. *Recall of the Laid-Off Employees and the Strikers' Offer to Return to Work*

On or about November 12, 1991, the Employer sent telegrams to the laid-off employees asking them to return to work by November 14.

In response to the Respondent's November 12, the Union sent a telegram to the Company offering, unconditionally, on behalf of the strikers to return to work.

On November 14, 1991, most of the laid-off employees and the strikers showed up for work. Those employees who appeared on November 14 and who had been laid off were reinstated. However, the strikers, except for Tomas Cervantes and Gennaro Herrera, were not.

According to employees Alvarado and Landaverde, Joseph D'Amiano told them that he would not recall the strikers; that the Company had hired replacements for them. Indeed, the evidence shows that the Company used some people employed by Robert Chrisman, an outside contractor, to continue to operate the Montgomery Grinder at the Woodbridge yard during November and part of December 1991.

On or about November 21, the Company recalled strikers Lucio Ortiz, Juan Reyes, and Francisco Reyes Cortez. The following week, Mario Mendoza was recalled and Policarpo Mendoza was not rehired until January 5, 1992. Two of the strikers, Avelardo Murillo and Efrain Camacena, were never recalled, the Company contending that they were discharged for good cause.

In view of my conclusion that the strike was an unfair labor practice strike, the Respondent was obligated to reinstate the strikers immediately upon their unconditional offers to return to work even if this required the Respondent to discharge any employees it may have hired to replace them. *NLRB v. Efco Mfg.*, 227 F.2d 675 (1st Cir. 1955), cert. denied 350 U.S. 1007 (1956). Although the Respondent ultimately did recall all but two of the strikers, it delayed reinstatement in the cases of Lucio Ortiz, Juan Reyes, Francisco Reyes Cortez, Mario Mendoza, and Policarpo Mendoza. This delay was, in my opinion, violative of Section 8(a)(1) and (3) of the Act.

H. *The Refusal to Rehire Avelardo Murillo and Efrain Camacena*

David D'Amiano testified that during the strike, Murillo, while visiting the office, shoved him in the shoulder and called him ''maricon'' in front of other people.[22] D'Amiano asserts that this was the reason that he refused to recall Murillo. The Respondent called two witnesses, Steve Vaselli and Thomas (Bear) Murphy who testified that they witnessed the alleged incident. They respectively stated however, that they did not think much of it at the time and that it did not seem like a big deal. Murillo denied that he either pushed David D'Amiano or that he called him a name. Murillo's version was corroborated by Gennaro Herrera.

As between David D'Amiano and his supporting witnesses and Avelardo Murillo and his supporting witness, I am inclined to credit the latter. Accordingly, I conclude that the Respondent's failure and refusal to recall Murillo violated Section 8(a)(1) and (3) of the Act.

The reasons given by the Respondent's witnesses for refusing to recall striker Efrain Camacena were, in my opinion, contradictory and invalid.

David D'Amiano testified that Camacena was discharged because he was caught overcounting the number of pallets that he had repaired and that this was not the first time that he had been warned about this. He asserted that although the amount was not much; perhaps only $5 per day, it nevertheless was cheating. (Since he was paid on a piece rate basis, his earnings were related to the number of pallets he repaired.) He also testified that the decision to discharge Camacena was made by his father who was the one who caught him.

Joseph D'Amiano testified that he didn't recall who Camacena was or why he was not reinstated. When pressed about Camacena's identity, he testified that he believed that Camacena had made a false disability insurance claim on behalf of his brother who had worked for the Respondent and who apparently suffered a stroke while at work. (Since it is agreed that Camacena's brother was found in a comatose state while at the Respondent's premises, I don't see how an assertion that he had a job related injury or illness could be construed as a deliberately false assertion.) In any event, Joseph D'Amiano did not assert as a reason for Camacena's discharge, the allegation that he had overcounted pallets.

Camacena denied that he ever overcounted the number of pallets that he repaired, and the Respondent did not produce any credible testimonial or documentary evidence to support its contention that Camacena had previously been warned for this or any other reason. Moreover, as it is plain that the Respondent's witnesses have given inconstant versions of why Camacena was not reinstated, I shall conclude that its failure to recall this unfair labor practice striker was violative of Section 8(a)(1) and (3) of the Act.

I. *Transfers to Pathmark*

Before November 14, 1991, the Company operated at Pathmark with two groups of employees working on two shifts of 10 hours each. Each shift had four employees and they were supervised by Pathmark personnel under the overall direction of Pathmark's manager, John Ormando. After November 14, the Respondent manned the Pathmark job with three shifts containing four men working 8 hours.

[22] The word ''maricon'' is a Spanish slang expression used to call a man a homosexual. In Latin American cultures this can be viewed as a grave insult depending upon context and vocal intonation.

After the employees who had been laid off on November 1, 1991, returned to work, about 16 of them were transferred at various times from their previous jobs at Carteret to repairing pallets at Pathmark.[23] These transfers took place during the period from November 14 to after the election which was held on December 10. While it was shown that it was possible to earn more money doing pallet repair work (done on a piece rate basis) than working as a laborer at Carteret, it also was shown that the pallet repair work was physically demanding in comparison to many of the other types of duties previously performed by these employees. Additionally, whereas these employees had worked daytime hours at Carteret, many were forced upon their transfer to Pathmark to work on the evening or graveyard shifts. Thus, for some, their hours of work were significantly changed as a result of the transfer.

During the same period of time, the Company moved at least two of its of employees (Valentin Rojas and Juan Trujillo) who had worked at Pathmark to Carteret.

The question to be asked is what was the rationale for this switch. Why was it done and what purpose did it serve?

David D'Amiano testified that in mid-November 1991, Pathmark's manager, John Ormando, requested that the Company use three, 8-hour shifts of four men each instead of the existing two-shift system. D'Amiano testified that because of this request, which necessitated the utilization of more employees but with fewer hours each, he could recall the laid-off strikers and assign them to Pathmark. While this may sound like a plausible rationale, its premise is undermined by the fact that although the Company called Ormando as a witness, he did not testify that he ever made such a request on the Respondent. D'Amiano's explanation therefore strikes me as a post hoc rationalization.

Since I discredit D'Amiano's explanation as to why the transfers were made, his intention becomes apparent if we ask ourselves what purpose they would likely have served.

In my opinion, the principle purpose of these transfers was to remove the union supporters from the other employees at Carteret so as to disrupt any efforts they could expect to have made to convince the undecided voters to vote for the Union. It is also my opinion that another reason for the transfers was to leave space at Carteret for employees whom the Company hired or intended to hire before the payroll eligibility date, in anticipation that any new people hired could be expected to cast their ballots in favor of the Company.[24] To put it bluntly, I think that a reason that the transfers were made was to allow the Company to try to gerrymander the unit. Finally, inasmuch as many of the transferees to Pathmark were being asked to do new jobs and in many instances at very inconvenient hours, I believe that the Company hoped that at least some of these union supporters would quit and therefore be ineligible to vote in the December 13 election.

[23] It is noted that two of the strikers whom the Respondent delayed in reinstating had previously worked at Pathmark repairing pallets. These were Lucio Ortiz and Francisco Reyes. Tomas Cervantes and Gennaro Herrera were immediately reinstated to their jobs at Pathmark.

[24] As noted above, the Union and the Company entered into a Stipulated Election Agreement on November 20, 1991. Among other things, that agreement insured that any employee hired before November 17, 1991, who was also employed on the date of the election, would be an eligible voter assuming that he or she was otherwise part of the bargaining unit and not ineligible for some other reason such as supervisory status.

J. *Disciplinary Warnings to Cuenca, Vasquez, and Ramblas*

On November 18, 1991, the Respondent issued written warnings to Cuhuatemoc Cuenca, Mario Vasquez, and Isidro Ramblas all of whom had signed union cards and who had been transferred to Pathmark upon their recall from layoff. They each received the same warning which related to the fact that they had left work at 10 a.m. on Saturday, when they were scheduled to work until 2 p.m.

Apart from the fact that the Company had never issued warnings of this nature before, the warnings themselves are senseless. The testimony of employees Vasquez and Ramblas was that they left early because no pallet deliveries were immanent. According to Vasquez, they asked the Pathmark supervisor if they could leave early and he said that they could do whatever they wanted to do. This was unrebutted by the Respondent, which acknowledged elsewhere that its employees, while at Pathmark, are supervised by Pathmark personnel.

On December 5, 1991, David D'Amiano issued a written warning to Marco Zarate, an employee who also had signed a union card. This stated in substance that he was absent for 2 days without having called in. The letter warned that any reoccurrence would subject Zarate to severe disciplinary action which could lead to termination.

The written warning to Zarate, like the written warnings to the three other employees noted above, seems to have no precedent in the Company's history and therefore can be construed as a new practice promulgated because of the union organizational drive. There being no evidence to show that these warnings were consistent with prior company practice, I shall conclude that the motivation in issuing them was to retaliate against union supporters. Accordingly I find that the issuance of these warnings constituted a violation of Section 8(a)(1) and (3) of the Act.

K. *The December 10, 1991 Layoffs*

Three days before the election, the Company laid off the following employees for 3 days:

Name	*Job as of December 10, 1991*
Cuhuatemoc Cuenca	Pallets/Pathmark
Leovigildo Gomez	Pallets/Pathmark
Antonio Gonzalez	Laborer/Woodbridge ???
Alejandrino Guzman	Pallets/Pathmark
Ignacio Landaverde	Forklift/Carteret
Etelberto Mendoza	Laborer/Carteret
Mario Mendoza	Forklift/Carteret (Pathmark on 12/14)
Florencio Moctezuma	Pallets/Pathmark
Roberto Pena	Pallets/Pathmark
Isidro Ramblas	Pallets/Carteret
Francisco Reyes	Pallets/Carteret
Juan Reyes	Pallets/Carteret
Mario Vasquez	Pallets/Pathmark
Pedro Ventura	Pallets/Pathmark
Marco Zarate	Pallets/Pathmark

All of these people had signed union cards and all either were strikers or had picketed the Company or both.

While asserting that these layoffs were economically motivated and that the proximate cause was the Company's lack of sufficient funds to pay their wages, it is noted that the Company had hired a number of other employees shortly before this group layoff. In this regard the evidence shows:

1. General Counsel's Exhibit 55, the ADP Master Control Report dated August 1992, shows that a man named Budinski was hired in November 1991 as a mechanic. He however does not appear on the payroll records as being paid until February 1992. The inference here is that this person worked off the books from November 1991 till February 1992.

2. The payroll records show that Maurice Murchison began working in the pallet area during the pay period ending November 17, 1991. Mario Mendoza testified that Maurice Murchison had been fired in the spring of 1991 and the Company's payroll records show that the last week he worked in 1991 was during the week ending April 28, 1991.

3. The payroll records show that an employee named William Curry had been terminated in July 1991 and was rehired for the recycling area during the week ending December 6, 1991.

4. The payroll records show that an employee named Kenneth Gilliam who was hired originally in August 1990, was terminated in late September 1991 and rehired for the pallet area, during the week ending December 1, 1990.

5. The payroll records show that an employee named Michael Murray who was originally hired in June 1991 was terminated during the week ending October 20, 1991, and was rehired for the recycling area, during the week ending December 8, 1991.

6. The payroll records show that an employee named Owen Sharkey who was originally hired in June 1991, was terminated during the week ending October 6, 1991, and was rehired for the pallet area during the week ending December 6, 1991.

Therefore, all of these people, in addition to the workers employed by Chrisman at the Woodbridge yard, were hired after the Union made its recognitional demand; after the November 1 layoffs; and after the strike commenced. They were retained despite the fact that the Company delayed its recall of the unfair labor practice strikers who had unconditionally offered to return to work on November 12, 1991. Moreover, despite having been recently hired (or rehired), this group of people, who were not involved with the Union, were retained on December 10, 1991, when the Company, purportedly for economic reasons, decided to lay off another group of employees, all of whom had supported the Union by signing union cards. There is, in my opinion a limit to coincidence, and it is my opinion that we have passed it. It is my conclusion that the key factor in deciding who to lay off on December 10, 1991 (assuming that that there was even any justification for the layoff in the first place), was who the Company believed were supporters of the Union and who the Company believed were not.

L. *Change in Pallet Piece Rates*

Historically, the Company has paid those people who repair pallets by the piece. Prior to the Union's organizing drive, the rate for pallets at Pathmark was 35 cents per pallet.

It is undisputed that in February or March 1992 (after the election), the Company reduced the piece rate at Pathmark to 30 cents per pallet and therefore reduced the rate of pay for these employees. This reduction was applied to all of the employees at Pathmark except for an employee named Bonifacio Flores, who happened to be the only person there who did not sign a union authorization card.

The Respondent's witnesses testified that it decreased the piece rate because there was an increased amount of scrap wood that it was required to buy from Pathmark and this affected adversely its net profit from that company. Again however, Pathmark's manager, John Ormando, failed to support this contention and testified, contrary to the testimony of Joseph and David D'Amiano, that there was no increase in the amount of scrap wood in February or March.

As the Respondent's explanation is, in my opinion, nothing more than a pretext, I conclude that the change in the piece rate was motivated by antiunion considerations and constituted a violation of Section 8(a)(1) and (3) of the Act.

M. *Alleged Refusal to Recall Vacationers*

The General Counsel alleges that the Respondent discriminated against five employees by refusing to put them back to work immediately upon their return to the United States after having made extended trips to their native countries. These persons are Rodrigo Armengolt, Isidro Ramblas, Acasio Galindo, Mario Vasquez, and Hector Galves.

There was testimony by some of the General Counsel's witnesses that in the past, they had been given permission to take substantial amounts of time off to visit their homelands and that upon their return they were immediately put back to work. While I have no question as to the fact that such employees have been recalled in the past, I don't believe that their testimony can be construed as proving that the Company had an unqualified policy or practice of giving any person his original job back immediately upon his return to the United States and irrespective of whether they had been away longer than expected and regardless of the Company's employment situation at the time of return. Such a policy would be irrational in my opinion, and although I view the D'Amiano's as being somewhat tempestuous, I don't think that they are stupid.

Rodrigo Armengolt was hired in April 1989 and prior to November 3, 1991, was on the Dauman Recycling payroll in department 700 (laborers). He testified that he worked as a switcher and the records show that he was paid $8 per hour. He signed a union card in October and was one of the employees laid off on November 1, 1991. He engaged in picketing until about November 8 or 9, 1991, whereupon he went to Mexico until the end of the month. While in Mexico, the Company sent a telegram to his New Jersey address advising that he was being recalled. Armengolt testified that after he returned and found the telegram at his home (presumably sometime in late November or early Dec. 1991) he spoke to David D'Amiano about going back to work but was told that he was too late, albeit David would speak to his father about it. Armengolt testified that he was rehired in mid January 1992 to do basically the same work as he had done before, but was told that he would be paid at $7 per hour because he was a new employee. (He appears again on the Dauman Pallet payroll record during the week of Jan. 23, 1992, in department 600 with a pay rate of $7 per hour.)

In Armengolt's case, there really is no issue as to whether he was on a ''leave of absence,'' since he went to Mexico while on lay off status, which was discriminatorily caused in the first place. While it is true that the Company on or about November 12, 1991, did send a telegram to Armengolt offering to recall him, this did not discharge its obligation to reinstate him when he received the telegram in late November and sought to return to work.[25] Having already concluded that the November 1 layoffs were violative of the Act, I find that the Company's refusal to recall Armengolt when he returned to this country constituted a violation of Section 8(a)(3) of the Act. I also conclude that although the Respondent did recall Armengolt in January 1992, it violated the act by reducing his wage rate from $8 per hour to $7 per hour.

Isidro Ramblas who worked in pallet repair signed a union card in October and was one of the employees laid off on November 1, 1991. He returned to work in mid-November after receiving a telegram offering reinstatement but was transferred from the Carteret yard to Pathmark. In early December 1991, Ramblas told David D'Amiano that he was going to go to Mexico and asked if he would be rehired when he returned. He states that D'Amiano replied that there might not be work when he returned. On December 15, 1991, 2 days after the election, Ramblas left for Mexico and stayed there until March 29, 1992. He testified that upon his return, he asked David D'Amiano for his job back and was told that there were too many people at work and suggested that he go with the lady from the Union. Sometime in late June 1992, Ramblas again left for Mexico and after his return in July, he was recalled to work on August 21, 1992. Upon his return, he was assigned to Carteret doing pallet repairs.

In my opinion, the testimony of Ramblas does not indicate that he was given permission to take an extended vacation with the guarantee that a job would be waiting for him upon his return. On the other hand, a review of the Respondent's Autopay Master Control records for 1992 (G.C. Exh. 55) shows that about 18 new employees were hired between April 1, and June 15, 1992, at wage rates ranging from $5.05 per hour to $11 per hour. Among those hired during this period included Mark and Mike Boland on May 5, 1992; Jason Bowers on May 19, 1992; Salvatore Collova on May 4, 1992; Bonifilio Guerera on May 11, 1992; Ruben Holmes on May 27, 1992; Michael Kelly on June 15, 1992; and Timothy McKim on Juen 15, 1992, etc.

Given my earlier conclusion that the Respondent had discriminatorily laid off Ramblas on November 1, 1991, and in view of the fact that the Respondent hired a fairly large number of new employes in the months of April, May, and June 1992, I am impelled to the conclusion that the Respondent acted with antiunion motivation in failing to recall or rehire Ramblas when he returned from Mexico on March 29, 1992.

[25] After receiving a valid offer of reinstatement, a discriminatee is entitled to a reasonable time to accept or reject the offer. *Friedeman's Calcasiue Locks Shipyard*, 208 NLRB 839 (1974). In the present case, I do not believe that foreclosing Armengolt's acceptance of the offer after a 2- or 3-week period when he was out of the country, fulfills the obligation to give him a reasonable time to accept the reinstatement offer.

Acasio Galindo was hired in April 1989 and repaired pallets on the Dauman Pallet payroll. He was one of the employees who signed a union card but was not laid off on November 1, 1991, because he had already left the country. Galindo testified that he was given permission by David D'Amiano to go to Mexico for 2 months beginning in October 1992. However, he continued to stay in Mexico until April 1992 and there is no evidence that he asked for or received permission to extend his vacation by another 3 or 4 months. Galindo testified that when he asked for his job back, David D'Amiano told him that there was no money and no job. He testified that he stayed at the same residence with the same phone number as he had before going to Mexico and that he remained there until July 1992 when he went to Atlantic City. Galindo never received an offer to return to work.

Galindo's case is very similar to the Ramblas situation in that Galindo, even if he had been given permission to take off for 2 months, overstayed his vacation by 3 or 4 months. As such, I would have no problem if the Company had chosen not to reinstate him if it could show that there was any decent reason not to do so and if the evidence did not also show that the Respondent hired a slew of new employees after Galindo returned and asked for his job back. In view of the evidence of antiunion animus and the failure to present any reasonable basis for its refusal to rehire Galindo, I conclude that its failure to do so constituted an 8(a)(3) violation.

Mario Vasquez began work in May 1990 and worked on the Dauman Pallet payroll record as a laborer. He signed a union card on October 5, 1991, and was one of the people who was laid off on November 1, 1991. Commencing on or about November 4, 1991, he engaged in picketing and was recalled by the Company when he received the November 12 telegram. As noted above, he received a disciplinary warning on November 18, 1991, while working at Pathmark and I have previously concluded that this warning was discriminatory in nature.

Vasquez testified that in June 1992 he received word that his wife was sick in Mexico and asked Joseph D'Amiano for permission to leave for 3 months. Vasquez states that D'Amiano said, ''fine'' although he refused to give a commitment that he could have his job back when he returned. According to Vasquez, he returned to the United States on July 5, 1992, and spoke to David D'Amiano who said that he could not put him back to work immediately. Vasquez testified that he was called back to work 2 weeks later. (Around July 17, 1992.)

I do not think that the evidence here is sufficient to show that the Respondent's refusal to rehire or recall Vasquez for a mere 2-week period was discriminatorily motivated. In this regard, it is noted that between July 5 and 17, 1992, the only newly hired bargaining unit person was Scott Brendel who was hired on July 13, 1992. (There were two women hired during this period, Shellie Kovaks and Claudia Pacheco, but they were hired for office jobs.)

Hector Galves began in May 1990 and worked as a laborer. He is listed on the Dauman Pallet payroll as a laborer with a pay rate of $7.50 per hour. He signed a union card on October 12, 1991, attended union meetings, and was laid off on November 1, 1991. Along with many of the other laid-off employees, he picketed until recalled to work in mid-November 1991. Galves claims that when he returned from

El Salvadore sometime in February 1992, his wage rate was reduced to $6 per hour. This, however, is not supported by the payroll records which continue to show that he got paid at $7.50 per hour and worked some overtime hours until he left the Company in May 1992. As I view the evidence regarding this allegation to be insufficient, I shall recommend that it be dismissed.

N. *Reassignment of Leovigildo Gomez*

The General Counsel alleges that the Respondent violated the act by reassigning Gomez in April 1992.

Gomez began working for the Company in June 1990. In September 1991 he was transferred from Woodbridge to Carteret and worked at unloading pallets from trailers. In October 1991 he signed a union card, attended union meetings, and was laid off on November 1, 1991. On or about November 14, he was recalled and transferred to Pathmark to repair pallets.

In December 1991, Gomez was transferred to Carteret to make pallets. He testified that he preferred to work at Pathmark. In March, Gomez was reassigned to repair pallets at Pathmark because one of the workers at that location was going on a trip to Mexico. Also in March 1992, Gomez, along with a number of other employees of the Company, signed a petition authorizing the Union to file an FLSA complaint with the Department of Labor which contended that the Employer had not paid overtime at time-and-a-half rates. (I am not sure how this would affect Gomez since he worked on a piece rate basis since Nov. 14, 1991.)

In early April 1992, Gomez was told that the vacationing worker was returning from Mexico and therefore he would have to return to Carteret. Gomez thereupon told David D'Amiano that he wanted to stay at Pathmark and according to Gomez, David said that he would try to work it out. He testified that on the following day, David told him that he could stay at Pathmark but would, temporarily, have to alternate days with another worker. According to Gomez, this situation lasted for about a week whereupon he resumed working full time at Pathmark. Gomez also testified that in mid-April 1992, David D'Amiano had him work some double shifts and I suppose this was done to make up for the time lost by Gomez when he alternated days during the 1-week period described above.

Based on the testimony of Gomez, I see no evidence that the Company violated the Act insofar as its dealings with him in March and April 1992. To the contrary, I see evidence here that the Company tried to accommodate him to the extent possible.

O. *Discharge of Mario Mendoza*

Mario Mendoza began working at the Company in June 1989. In August 1991, he transferred from Woodbridge to Carteret where he worked in department 700 as a laborer earning $8 per hour.

In October 1991, Mendoza attended union meetings and signed a union card on October 5, 1991. He was not, however, laid off on November 1, 1991, and he worked at the Carteret yard on Monday and Tuesday before going out on strike on November 6. According to Mendoza, on Friday, November 8, he went to pick up his check and David D'Amiano said in Spanish that Mendoza had stabbed him in the back by going on the picket line. (David D'Amiano is fluent in Spanish.)

Mendoza was recalled to work at Carteret in late November or early December 1991. He testified that when he returned, David D'Amiano told him that he would only be allowed to work 40 hours a week and he asserts that some newly hired employees were working more than 40 hours per week. As to this latter claim, it was evident from his testimony that he was in no position to competently testify regarding the hours of other employees and his opinion as to this is not given much weight even if sincerely expressed.

Mendoza was one of the employees laid off on December 10, 1991, and he was the Union's observer at the election held on December 13, 1991. On the following day, David D'Amiano told Mendoza that he was being transferred to Pathmark to repair pallets. When Mendoza said he didn't know how to do that, D'Amiano said it didn't matter; he would learn.

According to Mendoza, on or about April 28, 1992, he was told by Ormando, Pathmark's manager, that he could no longer work there anymore. Mendoza testified that he then spoke to his immediate supervisor at Pathmark, a Green, who said that he was not aware that there was anything wrong with the pallets done by him. Upon his return to the office, Mendoza asserts that David D'Amiano said that his pallets were not done right and that he couldn't work at Pathmark anymore. Thereafter, Mendoza applied for and obtained unemployment benefits.

At the start of the trial, the Respondent asserted that Mendoza had quit. Subsequently, David D'Amiano testified: ''I know he was let go at Pathmark. If we had work for him, we probably would have put him to work. I really don't know if he ever went back to work or not.'' Although the Respondent called Ormando as its witness he was not asked about Mendoza. Green was not called to testify and therefore he did not enlighten us about the circumstances leading up to Mendoza's leaving.

Applying the test of *Wright Line*, supra, I am inclined to believe that the General Counsel has made out a prima facie case that Mendoza was either fired or laid off because of his union activities. As the Respondent has not met its burden of showing that his termination was for other reasons, I shall conclude that the Respondent violated Section 8(a)(1) and (3) by discharging Mario Mendoza on April 28, 1992.

P. *The July 1992 Layoffs of Lucio Ortiz and Albino Diaz*

Both employees signed union cards in October 1991 and attended union meetings. Diaz was one of the people laid off on November 1, but Ortiz was not. However, Ortiz did join the picket line on November 11, 1991.

I have already discussed the troubles between Ortiz and David D'Amiano regarding his rent and so I won't repeat that here. Before November 1, 1991, Diaz worked as a laborer in Carteret and after his return from the layoff, he was assigned to work at Pathmark repairing pallets.

Both of these employees testified that they were laid off on July 17, 1991. Ortiz was not recalled, at least not by the time the hearing in this case closed on October 2, 1991. However, in the case of Diaz, he testified that he was recalled to work about a couple of weeks later, although according to General Counsel's Exhibit 55 (the Autopay Mas-

ter Control for 1992), it indicates that Diaz was rehired on August 20, 1992. At the time of their layoffs, both employees were working at Pathmark doing pallet repairs.

The hearing in this case opened on June 1, 1991, and Diaz testified that he was at the Board's Newark office during the first week of the trial waiting to give testimony. (He was not called at that time.) The General Counsel suggests that Diaz was selected for layoff at Pathmark because the Respondent, in passing by the lobby of the NLRB's office, saw that Diaz was sitting there and therefor surmised that he was going to testify against it. As to Ortiz, the General Counsel contends that the April 28, 1992 version of the complaint apprised the Respondent that an employee was complaining about his rent, thereby apprising it that Ortiz, who was the only employee with a rent dispute, was making an unfair labor practice allegation. (I don't quite understand how this makes Ortiz stand out from the dozens of other employees having equivalent unfair labor practice allegations.)

In this instance, I am not pursuaded that the General Counsel has established these specific allegations, at least as to the layoffs. The evidence tends to show that the Company's income did go down from May through July 1992. Thus, Respondent's Exhibits 32(a), (b), and (c) comprising summaries prepared by Michael Blancato, the Company's controller, show that income from pallet repairs for May was $290,342, for June $271,216, and for July $248,283. For August 1992, income from pallet repair rose to $338,873. Similarly, total income for the Company went from $723,897 in May, to $604.954 in June, to $559,555 in July, and back up to $681,467 in August 1992. As to the selection of Ortiz and Diaz, there really is not much to distinguish them from the other employees working at Pathmark, many of whom were alleged to have been illegally transferred to that location because of their union activities.

Having said that I do not believe that the General Counsel has established that the layoffs were violative of the Act, I do not understand why the Respondent did not recall Ortiz, as it did Diaz, in August 1992 when work picked up. Therefore, given the other unfair labor practices already found, indicating antiunion animus, and the failure to explain why Ortiz was not recalled as work picked up, I conclude that the Respondent violated Section 8(a)(3) of the Act by not recalling Ortiz in August 1992. (For purposes of determining back pay, I will assume that he likely would have been recalled at the same time as Diaz absent the discrimination.)

Q. *The Alleged Discrimination Against Domitilo Sanchez*

Domitilo Sanchez who signed a union card on October 12, 1991, but who neither was laid off nor a striker, was an important witness presented by the General Counsel and testified on September 21, 1992. He testified, among other things, that after November 1, 1991, he worked at the Woodbridge yard where there were a group of new people working with the Montgomery Grinder who were connected to Robert Chrisman. His testimony, which I believe, strongly undermined the assertion by the Company that the Montgomery Grinder was shut down at that time and that this was a major reason for the November 1 layoffs. Moreover, his testimony that there were new people working at the Montgomery yard doing essentially the same work as people who had been laid off, also undercut the Respondent's defences for the layoff.

Sanchez testified that in September 1992 he was working at Carteret but not on any fixed schedule. He testified that on September 22, 1992 (the day after he gave testimony), he was told to go home at about 3:25 p.m. According to Sanchez, when he got him home, his wife told him that she had received a call from David D'Amiano informing her that he and his cousin and coworker Pedro Sanchez should not come in the next day but should call in the morning about going to work. On September 23, 1992, Sanchez called David D'Amiano at about noon and was told to come to work. Instead, he came to the Labor Board and testified about the events of September 22.

The Respondent's position was that Sanchez was sent home a little early on September 22, 1992, because they had to fix the clutch on the tub grinder that he worked on.

While there may have been a reason for the Company to retaliate against Sanchez because of the testimony he gave in this hearing, I think that the General Counsel here has made much ado about nothing. At most, Sanchez was told to go home somewhat earlier than normal and was told to call in on the following day. When he did, he was told to go to work. This set of facts does not convince me that the Company discriminated against Sanchez either because of his union activities or because he gave testimony against the Respondent during the hearing.

R. *The Alleged Constructive Discharge of Nehemias Alvarado*

Nehemias Alvarado began work according to company records on December 15, 1991. He worked, prior to November 1, 1991, on the Dauman Recycling payroll in department 700 (laborers).

Alvarado signed a union card at a union meeting held at an employee's house in October 1991. He was laid off on November 1, 1991, at which time he was employed on the day shift earning $9 per hour.

Alvarado was one of the major witnesses called by the General Counsel, testifying on June 4 and 5, 1992. He testified as to which people were employed as of November 1, 1991, and what they did. He testified about the meeting at the diner described above and he also testified about a number of other conversations that are alleged to be an 8(a)(1) violation.

On November 15, 1991, Alvarado returned to work at Carteret. On December 10, 1991, he was one of the people laid off before the election. When he was recalled, he was assigned to repairing pallets at Pathmark. (In this respect, his reassignment was somewhat different from the other people who were transferred to Pathmark before the election.) In any event, from late December 1991 until the time he quit on July 14, 1992, Alvarado was assigned to the late shift (11 p.m. to 7 a.m.) which meant that his hours of work were drastically changed from what he had worked before.

According to Alvarado, the dust at the Pathmark facility made him sick from the time that he was transferred to that facility. (There is no question but that there is dust at the Pathmark facility. But there is also a good deal of dust at Carteret, which however, is unlike Pathmark in that Carteret is an open air facility.) Alvarado testified that because of the dust, he went to Doctor Manuel Lopez in 1991 and got a

prescription which did not help that much. He testified that his condition grew progressively worse but he did not go back to Dr. Lopez.

Alvarado testified that on July 14, 1992, he told David D'Amiano that he was very sick; that he had a sore throat, couldn't speak well, had a sore back, and that he could not continue to work his shift at Pathmark. He states that he asked if David could give him his old job back and was told that there was no other vacancy at that time, but would call Alvarado when a position became available. Alvarado testified that he told David D'Amiano that he was going to apply elsewhere for a job, albeit he was still interested in working at Dauman. He states that David asked if he was quitting and he replied no; that he only wanted to switch back to his old job.

The Respondent showed that Alvarado obtained a new job on June 5, 1992, working as an independent contractor, for First Interregional Equity Corp at $200 per week. More importantly, the Respondent demonstrated that Alvarado did not go to Dr. Lopez at any time during 1991; the last entry in the medical record being a visit on September 23, 1990.[26] Alvarado conceded that Pathmark provided masks to anyone who wanted them. Additionally, Alvarado did not at any time during the 8-month period prior to the time he quit, complain to Dauman's management or Pathmark's management that the dust in the air was making him sick.

In *EDP Medical Computer Systems*, 284 NLRB 1232, 1234 (1987), the Board stated:

> To establish a constructive discharge, it must first be proven that the burdens on the employee caused and was intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. Second, it must also be shown that these burdens were imposed because of the employee's union or other protected concerted activities. See *Groves Truck & Trailer*, 281 NLRB 1194 (1986); *Union 76 Auto Truck Plaza*, 267 NLRB 745 (1983).
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> . . . .
>
> The proper standard requires not only that the change in working conditions be difficult and unpleasant, but that the change be so difficult and unpleasant that it forces resignation. *Algreco Sportswear Co*., 271 499, 500 (1984).

Therefore, assuming that the the transfer of Alvarado to work at Pathmark repairing pallets was burdensome and motivated because of his union activities, it still must be shown that this was, in fact, the reason that he quit.

Had Alvarado quit soon after being assigned to Pathmark because of his dislike for being shifted from the day shift to the graveyard shift, this probably would have been sufficient to establish a constructive discharge. *Kime Plus, Inc*., 295 NLRB 127, 145 (1989). But that was not the reason that Alvarado claims that he quit. Rather, he asserted that it was the dust at Pathmark which was the principle reason for quitting as this made him so sick that he no longer could work there. The problem is that Alvarado did not, as he claimed, go to Dr. Lopez at any time that he worked at Pathmark and he never once complained about his ailments until the final day of the 8-month period that he worked there. That is, the reason he quit is demonstrably not what he claimed it to be and it is more likely that the real reason was simply because he had gotten another job.

S. *Alleged Discriminatory Reduction of Overtime Hours*

According to some of the General Counsel's witnesses they were sent home on November 1, 1991, at about 3 p.m. and told by Supervisor Macrina that they no longer could work more than 40 hours a week. Assuming arguendo that such a statement was made, this was the same day that the Company laid off these employees. That is, the evidence shows not that their overtime was reduced; rather it shows that 25 employees lost their jobs for 2 weeks. To talk about a reduction in overtime hours for people who were laid off is meaningless.

It seems to me that the question here is whether or not the Employer, after the return of the laid-off employees and the termination of the strike, discriminatorily assigned overtime work to one group of employees while depriving another group (union supporters) of this work. Since, the payroll records in evidence do not show such a disparity either before or after the Union began to organize the employees,[27] the factual questions are:

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[26] Notwithstanding Alvarado's prevarication about his visit to Dr. Lopez, I am inclined to believe his version of the events regarding the diner meeting which was corroborated by Landaverde. However, insofar as any 8(a)(1) allegation of the complaint is based solely on Alvarado's testimony, I shall recommend that it be dismissed because of my doubts as to his credibility. For example, I shall recommend dismissal of the following allegations:

1. That on November 14, 1991, Joseph D'Amiano threatened to sell or close the business and threatened to reduce the hours of those employees who signed union cards. (In this regard I note that Landaverde, who was with Alvarado on November 14, did not corroborate his testimony on these points.)

2. That the Respondent, in December 1991, prohibited employees from talking about the Union on its premises.

3. That on June 3, 1992 Joseph D'Amiano promised to transfer him back to Carteret if he did not testify against the company.

[27] G.C. Exh. 47 is a summary of overtime hours as shown by Dauman Pallet's payroll records for the period from January 3, 1990, through December 22, 1991. It shows significant amounts of overtime pay from January 3, 1990, though October 1990 at which time overtime declined and thereafter ceased from the period ending November 25, 1990, to the end of 1991.

Also received into evidence were the Dauman Pallet weekly payroll records as R. Exh. 13 and the Dauman Recycling payroll records which are R. Exh. 12. The former leaves off at the week ending July 21, 1992, and R. Exh. 12, combines both groups from that point onward. These records show that of the seven or eight hourly paid employees who were on the Dauman Pallet payroll until June 21, 1992, the people who worked some overtime after January 1992 were Hector Galves, Manuel Garcia, Domitilo Sanchez, Pedro Sanchez, Ignacio Landaverde, and Cuhuatemoc Cuenca, all of whom signed union cards. However, Domitilo and Pedro Sanchez, far exceeded anyone else in the amount of overtime they worked and although both were card signers, they were not among the people laid off on November 1, or December 10, 1991, and were not strikers. Also working a lot of overtime hours relative to the other employees, was Cuhuatemoc Cuenca.

1. Is there any means to determine whether there was a disparity between one group and another and which particular employees, if any, were adversely affected?

2. Over what period of time did this disparity take place?

3. Is there any mechanism by which to measure the disparity, assuming that one exists, so as to determine who would receive how much back pay?

Some of the General Counsel's witnesses testified that prior to November 1, 1991, they worked an average of 50, 60, and 70 or more hours per week. They testified that at some point in early 1991, before there was any union around, the Company started paying employees at straight time for overtime hours and paid such amounts in cash. (The regular 40 hours being paid by check.) It is argued that because the Company did not retain timecards and because its weekly payroll records did not reflect the alleged cash payments for overtime hours, the payroll records are not accurate.[28]

On the other hand, I find problematical the inference that a company would pay what would, according to the General Counsel's evidence, be huge amounts of cash to employees which it then could not document as a business deduction for tax purposes. Also, even assuming that employees, at some period prior to the union's advent on the scene, did work undocumented overtime (at straight time wages),[29] this by itself does not show that there was similar amounts of overtime available after the Company moved its facilities from Woodbridge to Carteret. The income summaries introduced through the Company's controller show that the Company's gross earnings for the first 8 months of 1992 were lower by $370,342 than the similar period in 1991.

As indicated above, I think the crucial factual issue here is whether there is convincing evidence that the Company discriminated against union supporters in the assignment of overtime hours.

In support of its contention that overtime was discriminatorily reduced for the union supporters, the General Counsel adduced testimony on this subject from Ignacio Landaverde, Hector Galves, Manuel Garcia, and Mario Mendoza.

Mario Mendoza was one of the strikers and he returned to work at Carteret around November 20, 1991. He asserts that when he returned he was told that his hours would be from 8 a.m. to 4:30 p.m. However, as he worked at repairing pallets, his earnings were not based on a wage rate but rather on a piece rate. Although he testified that new employees working at Carteret during late November and early December worked more than 40 hours per week, he could not state who they were or what they did. Moreover, it is not at all clear that Mendoza was in a position to ascertain the actual hours of other people. He claimed that they came to work earlier then he or left later than he.

The Dauman Recycling payroll records do not show that any employees worked overtime during late November and early December 1991. (The first recorded overtime on these records occurred in Jan. 1992.) The Dauman Recycling records show that seven employees, in addition to working on an hourly rate, also did some piecework during the weeks ending November 24 and December 1, 1992. However, the amounts do not appear to be significant and were of extremely limited duration. The largest figure was for Eugene Murchison, who in addition to working his 40-hour shifts, also earned $211.75 and $79.50 for each week. At the other extreme, Chris Moore, James Govan, and Anthony Fabrizzio earned from $1.50 to $3 during either week. The remainder, Lloyd Mullen earned $120 at piece rates during the week ending November 24; Jan Chwialkloski earned $93 at piece rates during November 24 and $81.10 during the week ending December 1; and Donald Bartlett Sr. earned $90 at piece rates during the week ending November 24.

Hector Galves testified that prior to February 1991 he generally averaged 6 days a week and worked a great deal of overtime. (This is consistent with the summaries prepared by the General Counsel which show a significant amount of overtime up until the end of Nov. 1990.) Galves testified that in January and February 1992, he worked less overtime than before. (Before when?) He states that after he signed the FLSA's overtime complaint in March 1992, Fabrizzio told him that if he punched in at 7 a.m. he would have to punch out at 3 p.m. (i.e., a 40-hour week).

The Dauman Pallet payroll records show that Galves did, in fact, work overtime from January through May 17, 1992, when he left the Company. (During the week ending May 17, 1992, the records indicate that he earned $33.75 in overtime pay.) Thus, although the General Counsel asserts that his overtime hours were withdrawn after he signed the FLSA's petition on March 14, 1992, the payroll records reflects his continued receipt of overtime pay after that date.

Manual Garcia testified that he too worked a great many overtime hours in the past. He states that when he was recalled from the November 1, 1991 layoff, he worked 8 a.m. to 4 p.m. without overtime and that Nick Macrina told him that he would not be able to work more than 40 hours per week. Garcia states that in early March 1992 he was asked by Joseph D'Amiano if he wished to work 1 hour of overtime per day and that he did that for about 2 weeks. He states that he also worked two Saturdays between January and March 1992. According to Garcia, after he signed the FLSA's petition, Joseph D'Amiano told him and Hector Galves that they no longer could work overtime. He acknowledges however, that about 1 week after this conversation, he resumed getting overtime.

In Garcia's case, the payroll records show that he received overtime from January through August 1992 when the exhibits end. Except for February 1992, he received overtime pay during each of those months ranging from no overtime during some weeks to a high of $137.81 during the week ending March 29, 1992.

Ignacio Landaverde, also on the Dauman Pallet payroll, testified that at an unspecified time after the election, he asked David D'Amiano how come new employees were getting more hours than the more senior employees. He states that David responded that if Landaverde wanted more hours,

[28] Time cards are not records which are required to be retained pursuant to the Fair Labor Standards Act (FLSA) provided that daily hours are transcribed onto weekly payroll records that otherwise would meet the record keeping requirements. 29 CFR § 516, et seq.

[29] The fact is that G.C. Exh. 47 and R. Exhs. 12 and 13, demonstrate that overtime was documented in the payroll records from January 3 to November 18, 1990, and from January 1 through August 1992.

he should get them from the Union.[30] Despite believing that David D'Amiano said this to Landaverde, I still do not think that the evidence was sufficient to prove that over an extended period of time, that Landaverde or anyone else was discriminated in the apportionment of overtime.

In Landaverde's case, the Dauman Pallet and Dauman Recycling payroll records show that from January 16 until April 12, 1992, there were only a small number of hourly employees who were recorded as having worked any overtime. The Dauman Recycling payroll records indicate that between January 1 and June 1992 three hourly paid employees worked a total of 10 overtime hours during the weeks ending January 16 and March 29, 1992. The Dauman Pallet records show that from January through March 1992, Hector Galves, Manuel Garcia, Rodrigo Armengolt, Domitilo Sanchez, and Pedro Sanchez were the hourly employees who worked overtime. Usually during that period, there were two or three employees who worked overtime during any given week. Commencing during the week ending April 12, 1992, Ignacio Landaverde began working overtime on a steady basis. (In one instance, which is atypical, Landaverde earned $742.50 in overtime pay during the week ending May 10, 1992.) Indeed when the payroll records for both Companies were combined in June 1992, Landaverde was one of the employees who consistently worked 7.5- to 10.5-overtime hours per week. (Incidentally the combined records show that overtime work picked up considerably after June 1992 insofar as the number of employees and the amounts of overtime assigned.)

T. *Miscellaneous 8(a)(1) Allegations*

In addition to the above, I hereby make the following findings based on testimony that I credit and which I conclude are statements in violation of Section 8(a)(1) of the Act:

1. In November 1991 Nicholas Macrina told Manuel Garcia that because he signed a union card, his wage rate would be reduced from $7.50 to $6.50 per hour. Although this did not happen, I view that statement as a threat of reprisal and therefore a violation of Section 8(a)(1).

2. In December 1991, David and Joseph D'Amiano threatened Ignacio Landaverde with discharge if he supported the Union.

3. That some time in 1992, Joseph D'Amiano told Landaverde in effect, that everyone would be out if the Union won any rerun election.

4. On or about November 5, 1992, Robert Buglioli interrogated Mario Mendoza as to whether he had signed a union card and said, in effect, that if he did, he would have to collect unemployment. The latter remark is construed as a threat of discharge.

5. In November 1992, David D'Amiano told Albino Diaz, while the latter was engaged in picketing, that he did not want a union and that if the employees continued to strike, they would sell the Company.

U. *The Objections*

Having concluded above that the November 1, 1991 layoffs constituted an unfair labor practice, I sustain the Union's objections insofar as they rely on that conduct. This would be, by itself, sufficient to invalidate the election. *Playskool Mfg. Co.*, 140 NLRB 1417, 1419 (1962); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962); *Ponn Distributing*, 203 NLRB 482, 495 (1973).

V. *Is a Bargaining Order Appropriate?*

The Respondent obviously denies that it committed the unfair labor practices alleged and therefore argues that a bargaining order cannot be granted. It argues alternatively that the unfair labor practices are not sufficiently serious to warrant a bargaining order. It finally argues that no bargain order should be granted because most of the allegations occurred before the election; that the Union nevertheless went ahead with the election despite the alleged misconduct; and therefore the Union waived any right it might otherwise have to a bargaining order.

It has been a long time since the Respondent's third contention was the law. In 1954 the Board in *Aiello Dairy Farms Co.*, 110 NLRB 1365 (1954), held that if a union participated in an election after the employer had refused its request for recognition, it waived a bargaining order remedy. Under that case, if unlawful conduct was committed before an election, the Union's sole remedy was to have the election set aside and have a new election conducted. The *Aiello* decision was *overruled* in 1964 by *Bernel Foam Prods Co.*, 146 NLRB 1277 (1964), and reverted to its pre 1954 doctrine. The Board stated:

> [T]he so-called choice which the union is forced to make under *Aiello* between going to an election or filing an 8(a)(5) charge is at best a Hobson's choice. Although an election is a relatively swift and inexpensive way for the union to put the force of law behind its majority status, the procedure is highly uncertain entailing the real possibility that because of conduct by the employer no fair election will be held. . . . Since this difficult and rather dubious ''choice'' is created by the employer's unlawful conduct, there is no warrant for imposing upon the union which represents the employees, an irrevocable option as to the method it will pursue . . . while permitting the offending party to enjoy at the expense of public policy the fruits of such unlawful conduct.

The rule that a union does not waive any rights to a bargaining order because it proceeded to an election, was confirmed by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In that decision, the Court decided four separate cases, one of which involving a company called General Steel. As to General Steel, the Court enforced a bargaining order where a union, initially having obtained authorization cards from a majority of the employees, had lost an election in which the employer's conduct had invalidated the election.

In *NLRB v. Gissel Packing Co.*, supra, the Supreme Court distinguished between three categories of situations insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the ''exceptional'' case where ''outrageous'' and ''pervasive'' unfair labor practices are committed. The second category involves ''less pervasive practices'' that have a tend-

[30] Ignacio Landaverde was a reluctant witness as far as the General Counsel was concerned. He initially ignored the General Counsel's subpoena and only testified after being compelled to do so by a Federal judge.

ency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be proper to remedy an employer's unlawful conduct which had the effect of making a fair election unlikely where at some point the union had majority support amongst the employees. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a ''minimal impact'' on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices.

In cases where an election has been conducted, the Board has held that a precondition to the granting of a bargaining order is that the election be set aside because of conduct interfering with the conduct of the election. *Irving Air Chute Co*., 149 NLRB 627 (1964); *Great Atlantic & Pacific Tea Co*., 230 NLRB 766 (1977).

In my opinion all the conditions necessary to grant a bargaining order have been fulfilled in this case. First, the evidence established that the Union obtained authorization cards from a majority of the bargaining unit employees. Second, I have concluded that the Employer's unlawful conduct interfered with the election which should therefore be set aside.

Finally, it is my opinion that the conduct of this Employer was pervasive and made a fair rerun election unlikely. In this regard, the record shows, among other things, that the employer made threats of discharge and threats of plant closure. Additionally, I have concluded that the Employer laid off large groups of employees for discriminatory reasons on November 1 and December 10, 1991. I have also found that the Employer refused to rehire strikers in a timely manner once they made offers to return to work; that it shifted people into jobs unfamiliar to them in the hope that some would quit before the election; and that it attempted to gerrymander the election by either hiring temporary employees or by asserting that people who did not work for the Company were on its payroll and eligible to vote. By these actions, the employees were put in fear of losing their jobs and income if they voted for the Union. Moreover, it is clear to me that the Employer attempted to undermine the election process itself by its gerrymandering actions.

I do not think that the Employer's actions can readily be erased by the use of traditional remedies and I believe that the Respondent has demonstrated a willingness to interfere with and undermine the election process. *299 Lincoln Street, Inc*., 292 NLRB 172 (1989); *American Display Mfg. Co*., 259 NLRB 21 (1981). I therefore conclude that the Union is entitled to a bargaining order pursuant to Section 8(a)(5) of the Act.

W. *The Challenges*

Strictly speaking, it is not necessary for me to decide whether or not the challenged ballots should be opened and counted inasmuch as I have decided that the election should be set aside and a bargaining order should issue. Nevertheless, with the possibility that the Board or a reviewing court may disagree with my decision to grant a bargaining order, I shall attempt to resolve the challenged ballots as follows:

Having already concluded that Robert Buglioli, Thomas Kenny, and George Salerno were supervisors within the meaning of Section 2(11) of the Act, I sustain the challenges to their ballots.

The Company conceded and I find that certain individuals were not eligible voters. Accordingly, I sustain the challenges to the ballots of Jack Lambly, Richard Menkin, and Daniel Zrodsky.

I sustain the challenge to the ballot of Vincent Gatto who left the Company in September 1991 and was rehired in July 1992. As I have concluded that he did not have a reasonable expectation of recall at the time he left, and as he was not employed as of the payroll eligibility date (Nov. 17, 1991), he was not an eligible voter.

The evidence regarding James Gatto shows that he left the Company's employ during the week ending September 22, 1991, and the records do not show that he worked thereafter. I therefore shall sustain the challenge to his ballot as the evidence shows that he was not employed as of the eligibility date.

William Curry, a mechanic, left the Company during the week ending July 14, 1991, and returned briefly, on a 6-hour per week basis, for 2 weeks in December 1991. He returned after the payroll eligibility date and left after the election. He did not return on a permanent basis until late January 1992. Absent evidence that he was temporarily laid off, on a leave of absence, on vacation, etc., I shall sustain the challenge to his ballot as it appears that he was not an employee as of the eligibility date.

The evidence shows that Kenneth Gilliam, a truckdriver, left the Company during the week ending September 29, 1991, and returned during the week ending December 8, 1991. As in the case of Curry, there was no evidence to establish that the hiatus in his employment was intended to be temporary in nature and therefore I shall sustain the challenge to his ballot because he was not employed as of the eligibility date.

Maurice Murchison left the Company during the week ending May 2, 1991. The evidence shows that he was rehired during the week ending November 17, 1991, and worked only until the election was over. (Dec. 13, 1991.) In my opinion Maurice Murchison was rehired as a temporary employee and the duration of his employment was meant to coincide with the election eligibility date and the day of the election. I therefore shall sustain the challenge to his ballot.

The evidence concerning Owen Sharkey is essentially the same as that for Maurice Murchison. Owen Sharkey left the Company during the week ending October 6, 1991, and returned to work as a part-time employee for the period from the week ending December 1, until the week ending December 15, 1991. The records do not indicate that he ever worked again and I conclude that if he was employed on both the eligibility date and the day of the election, his employment during that time was temporary in nature. I therefore shall sustain the challenge to his ballot.

Michael Murray left the Company during the week ending October 20, 1991, and reappeared on the payroll records for a total of 17.5 hours during the week ending December 15, 1991. The records indicate that he left after the election and was not rehired until the week ending March 1, 1992. His brief appearance on the payroll record during a single week in December 1991, does not indicate to me that his leaving in October 1991 was not intended to be permanent. As he was not employed on the eligibility date, I shall sustain the challenge to his ballot.

Martin Duffy was first employed by the Company in June 1990. He left the Company before the election because he was confined to a drug rehabilitation program for an indefinite period. He never returned to work, at least not up to the time that the hearing in this case closed. In all the circumstances, it is my opinion, that Duffy was not, as of the eligibility date, an employee who had a reasonable expectation of recall. I therefore shall sustain the challenge to his ballot.

The payroll records indicate that Michael Cimilluca was hired on October 2, 1991, and worked during the week of the election. The Dauman Recycling payroll records show that he worked during the week ending November 17, 1992, but did not work during the weeks ending November 24, December 1, and December 8, 1991. He worked almost 30 hours during the week ending December 15, 1991, but did not work during the next 2 weeks. Thereafter he worked until February 9, 1992. There is to my mind some ambiguity as to whether Cimilluca was an employee during the relevant period of time. Nevertheless, as he was employed on the eligibility date, was working during the week of the election and did work during January 1992, it seems to me that the burden should be on the Union to establish that his employment had terminated during any portion of that time. As this was not done, I conclude that the challenge to Cimilluca's ballot should be overruled.

Lee Roy Holmes and Daniel Smith were non clerical and nonsupervisory employees who were employed as of the eligibility date and the date of the election. There was no evidence to support the Union's assertion that Smith was a guard. I therefore conclude that both were eligible voters and that the challenges to their ballots should be overruled.

I have already concluded that Anthony Salerno, Michael Becker, and Sacramento Rojas were not supervisors as contended by the Union. Also as the evidence shows that they were employed as of the eligibility and election dates, I conclude that the challenges to their ballots should be overruled.

CONCLUSIONS OF LAW

1. The Respondent, Dauman Pallet, Inc., Dauman Recycling, Inc. and Dauman Industries, are a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Plastic, Metal, Trucking, Warehouse and Allied Workers Union, Local 132-98-102, International Ladies Garment Workers' Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including employees employed by the Company at Pathmark (Woodbridge, New Jersey) and Rickel's (South Plainfield, New Jersey) but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 1, 1991, the Union has been and is the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining with the meaning of Section 9(a) of the Act.

5. Since November 1, 1991, the Respondent has refused and is refusing to bargain collectively with the Union and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The Respondent violated Section 8(a)(1) and (3) of the Act by laying off 25 employees on November 1, 1991.

7. The Respondent violated Section 8(a)(1) and (3) by delaying the recall of unfair labor practice strikers upon their unconditional offers to return to work.

8. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Avelardo Murillo and Efrain Camacena.

9. The Respondent violated Section 8(a)(1) and (3) of the Act by laying off 15 employees on December 10, 1991.

10. The Respondent violated Section 8(a)(1) and (3) of the Act by issuing disciplinary warnings to Cuenca, Vasquez, and Ramblas.

11. The Respondent violated Section 8(a)(1) and (3) of the Act by reducing the piece rates for pallet repair of the employees assigned to work at Pathmark.

12. The Respondent violated Section 8(a)(1) and (3) of the Act by refusing to recall or rehire employees Rodrigo Armengolt in late November or early December 1991; Isidro Ramblas on March 29, 1992; and Acasio Galindo in April 1992.

13. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Mario Mendoza on April 28, 1992.

14. The Respondent violated Section 8(a)(1) and (3) of the Act by refusing to recall Lucio Ortiz in August 1992.

15. The Respondent violated Section 8(a)(1) and (3) of the Act by transferring strikers and union supporters to Pathmark in November and December 1991.

16. The Respondent violated Section 8(a)(1) of the Act by offering increased wages to Nehemias Alverado and Ignacio Landaverde on or about November 7, 1991.

17. The Respondent violated Section 8(a)(1) of the Act by threatening to reduce the wage rate of Manuel Garcia because he signed a union card.

18. The Respondent violated Section 8(a)(1) of the Act by threatening Ignacio Landaverde with discharge if he supported the Union.

19. The Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees with discharge if the Union won any rerun election.

20. The Respondent violated Section 8(a)(1) of the Act by interrogating Mario Mendoza as to whether he had signed a union card and by implying that he would be discharged if he did.

21. The Respondent violated Section 8(a)(1) of the Act by telling Albino Diaz, while the latter was engaged in picketing, that the Company did not want a union and that if the employees continued to strike the Company would be sold.

22. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

23. The Respondent has not committed any other unfair labor practices alleged in the complaint.

23. The Union's objections to the election are sustained to the extent that they allege Respondent's conduct occurring between the filing of the petition (Oct. 21, 1991), and the holding of the election (Dec. 13, 1991), which I have concluded were unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged, laid off, refused to recall or rehire employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Additionally, as the Respondent for discriminatory reasons, has transferred certain employees from their pre November 1, 1991 jobs, I shall recommend that it offer to reinstate them to those jobs. If it can be shown that their earnings would have been higher in their old jobs than in the jobs to which they were illegally transferred, the Respondent should make them whole, with interest, from the date of transfer until to the date they are offered reassignment in the same manner as prescribed above.

For the reasons stated above, I shall recommend that the Respondent be ordered to bargain with the Union upon request.

The General Counsel seeks a broad visitorial clause in these cases. In *299 Lincoln Street, Inc.*, 292 NLRB at 175, the Board declined to grant a broad visitatorial clause as part of the remedy and stated that it would not do so unless ''the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance.'' In the present case, although I have concluded that the Respondent has violated the Act in numerous and serious ways, it has not been demonstrated to me (for example by failing to comply with subpoenas served on it) that there is a probability that the Respondent would seek to evade any compliance investigation that may subsequently take place. However, as there may be some difficulties in ascertaining time and wages worked by employees, it is ordered that the Respondent specifically retain, in addition to weekly payroll records, all individual timecards for all employees who are employed by the Respondent until compliance in these case are completed. (The retention of timecards is part of the routine order granted in these types of cases and I only wish to emphasize it herein.)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Dauman Pallet, Inc., Dauman Recycling, Inc. and Dauman Industries, a Single Employer, and Joseph D'Amiano and David D'Amiano, Individually Carteret, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Plastic, Metal, Trucking, Warehouse and Allied Workers Union, Local 132-98-102, International Ladies Garment Workers' Union, AFL–CIO as the exclusive bargaining representative of all the Respondent's employees in the appropriate unit.

(b) Discharging, laying off, refusing to recall or rehire, transferring or otherwise disciplining employees because of their activities or support for the Union.

(c) Reducing or threatening to reduce the wage rates or piece rates of its employees because of their union activities.

(d) Offering or promising increased benefits and wages in order to induce its employees to refrain from supporting the Union or engaging in protected concerted activities.

(e) Threatening employees with discharge or the sale of its business, on account of their union activities or if the Union were to win an election.

(f) Coercively interrogating and otherwise intimidating its employees with regard to their union activity.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, including employees employed by the company at Pathmark (Woodbridge, New Jersey) and Rickel's (South Plainfield, New Jersey) but excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) Offer all employees who have been found to have been illegally discharged, refused recall or rehire, or transferred, immediate and full reinstatement to their former jobs or, if those job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful discharges, lay offs, warning notices or any other adverse actions which I have concluded to be unlawful herein and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in New Jersey copies of the attached notice marked ''Appendix.''[32] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representa-

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

tive, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the Union's objections to the election be sustained as described above and that the election held on December 13, 1991, in Case 22–RC–10545 be set aside.

APPENDIX A

ORDER

Both the General Counsel and the Union served subpoenas upon the above named Companies and upon their principal owners, Joseph and David D'Amiano, to appear at the hearing and to produce certain documents. (Copies attached hereto.) [Omitted from publication.]

On May 26, 1992, the Respondents filed a Motion to Revoke the Subpoenas.

On June 1, 1992, at the opening of the hearing, the Respondent's counsel modified his position and indicated that he was complying with both the Union's subpoena (which asked for payroll records for bargaining unit employees for the period from June 1, 1991, through Mar. 31, 1992) and items 11 through 16 of the General Counsel's subpoena addressed to the companies. As to item 17 of that subpoena, Respondent's counsel asserted that no such documents existed apart from attorney client communications, which all agreed were not disclosable.[1]

The Respondent also does not oppose the subpoena issued to the D'Amiano's insofar as they require them to produce records of charges to all personal telephone lines including charges to cellular phones and calling cards made during the period October 15 to December 1, 1991.[2] They also do not oppose production of records relating to certain properties owned by David D'Amiano located at 55 New Street and 387 School Street, Woodbridge, New Jersey.

The other documents sought by the General Counsel in the foregoing subpoenas all relate to the contention that Joseph and David D'Amiano should be held to be personally liable notwithstanding the operation of their business through a closely held corporation. In short, the General Counsel seeks to ''pierce the corporate veil,'' so that the owners will be responsible individually for any moneys owed *if* there is a finding of liability and if the corporations are unable to pay.[3]

The Respondent contends that the General Counsel should not be entitled to this material because the documents are not relevant to any legitimate issue in the case. It argues that at the least, the General Counsel should be required to first make an offer of proof of any independent information that it might have to show some basis for the contention that the D'Amianos should be held personally liable. (In essence, the Respondent argues that the General Counsel has made this allegation without any reasonable justification and is seeking, through the use of a subpoena, to bootstrap itself, on the hope that they will discover something in these records.)

Alternatively, it argues that the subpoenaed documents relate to a matter which more appropriately should be dealt with at the compliance stage of this proceeding in the event that the General Counsel wins on the merits. It therefore contends that the production of these documents should be postponed until compliance. The Respondent also contends that even if relevant and timely, the documents subpoenaed, which require production of both corporate and personal financial information over an extended period of time, are confidential and therefore require a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

In my opinion the documents subpoenaed are relevant to an issue in the case, namely the allegation that the D'Amianos should be held personally liable because of an intermingling of personnel and corporate assets. In *Riley Aeronautic Corp*., 178 NLRB 495 (1969), the Board stated at 501:

> ''[E]asily the most distinctive attribute of the corporation is its existence in the eye of the law as a legal entity and artificial personality distinct and separate from the stockholders and officers who compose it.'' *Wormser, Disregard of the corporation Fiction and Allied Corporation Problems* (Baker, Voorhis and Company, 1927), p. 11. ''The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception.'' *N.L.R.B. Deena Artware,*

[1] Payroll records were brought into the Regional Office on June 1, 1992, and remained there through June 5. The Respondent was allowed to take back the payroll records while the case was adjourned to July 14, 1992, on the condition that they be made available, during the interregnum, to the General Counsel and to the Union's counsel at their request.

[2] In the subpoena the dates are October 15 to December 1, 1991. This clearly is a typographical error and it is understood by all that the relevant period is in 1991 as the documents are related to alleged transactions that occurred on or about November 7, 1991, which involved the use of a conference call by David D'Amiano to two employees and the use of a cellular phone from a Diner.

[3] The first amended consolidated complaint alleges at par. 41:

41. (a) At all times material herein, Joseph D'Amiano an individual, has been president of Dauman Pallet, Inc., and has formulated, implemented, and administered all labor relations policies affecting its employees.

(b) At all times material herein, David D'Amiano, an individual has been president of Dauman Recycling, Inc., and has formulated, implemented, and administered all labor relations policies affecting its employees.

(c) At all times material herein, Joseph D'Amiano and David D'Amiano have been solely responsible for and made all decisions concerning all financial, business and other affairs of Respondent.

(d) On various dates unknown to the General Counsel but particularly within the knowledge of Respondent, Joseph D'Amiano and David D'Amiano intermingled their personal assets and affairs with those of Respondent.

(e) By virtue of the acts and conduct described above in paragraphs 41(a) (b) (c) and (d) Dauman Pallet, Inc. and Dauman Recycling Inc., and Joseph D'Amiano and David D'Amiano individuals are and have been at all times material herein, alter egos and a single employer with the meaning of the Act.

> *Inc*., 361 U.S. 398, 402–403. Nevertheless, the corporate veil will be pierced whenever it is employed to perpetrate fraud, evade existing obligations, or circumvent a statute. *Isaac Schrieber, et al., individually, and Allen Hat Co*., 26 NLRB 937, 964 enfd. 116 F.2d (C.A. 8). Thus, in the field of labor relations the courts and Board have looked beyond organizational form where an individual or corporate employer was no more than an alter ego or a ''disguised continuance of the old employer.'' (*Southport Petroleum Co. v. N.L.R.B.* 315 U.S. 100, 106); or was in active conduct or participation in a scheme or plan of evasion. (*N.L.R.B v. Hopwood Retinning Co*., 104 F.2d 302, 304 (C.A. 2); or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay (*N.L.R.B. v Deena Artware, Inc*., supra . . . or so integrated or intermingled his assets and affairs that ''no distinct corporate lines are maintained.''[4]

In *Brink's Inc*., 281 NLRB 468 (1986), the Board stated that the Section 102.66(2) permits a hearing officer to revoke a subpoena:

> [I]f, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question of the proceedings, or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid.

It is also my opinion, that the documents sought from the corporations and their owners are not privileged; do not constitute trade secrets such as formulas, patents, etc.; and do not comprise confidential commercial information such as customer lists, etc. To the extent that the Respondent might have a legitimate interest in nondisclosure, that interest, in my opinion, would be outweighed by the relevancy of the documents to the issues in this proceeding.

Nor do think that the case law requires that the General Counsel first make an independent showing that it has evidence supporting the allegation, before being allowed to subpoena records of the Respondents. *Storkline v. NLRB*, 298 F.2d 276 (5th Cir. 1962).[5] If the allegation was made without substantial justification, the Respondent will win on the issue, and if it is a qualified prevailing party it may seek attorney fees under the Equal Access to Justice Act.

Respondents request a protective order and such an order may be appropriate where relevant confidential information is subpoenaed. *Brink's Inc*., supra at 469 fn. 5. In this respect, The Federal Rules of Civil Procedure at Section 26(c) provide inter alia that a court:

> [F]or good cause shown . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions . . . (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into . . . (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

The Respondent asserts quite correctly that the issue of personal liability could be reserved to the compliance stage of the proceeding. *Air Vac Industries*, supra; *Workroom for Designers*, 274 NLRB at 841 fn. 8. It argues that the issue of personal liability has practical consequence *only* if the Respondent loses the case on the merits and *if* the net backpay owed cannot be paid by the corporations. Inasmuch as this trial will take at least 15 to 25 days of hearings, the Respondent argues that as a matter of efficient casehandling (and so as not to bankrupt his client), it would make far more sense to defer this issue to compliance.[6] I also note that on June 2, 1992, the Regional Director filed a 10(j) petition relating to this same case in the Federal District Court. I tend to agree, particularly as most of the employees who were laid off have been reinstated (except for three).[7]

There is no question but that it is within the discretion of the General Counsel to litigate this issue during the initial phase of the unfair labor practice proceedings. That does not

[4] There seems to be two separate theories upon which personal liability can be asserted despite the existence of a corporate entity. In one, where there is evidence that the principal stockholder has so intermingled his own assets with those of the corporation, it may be said that he has waived any rights he might otherwise have to utilize the corporate form to insulate himself from personal liability. In such cases, the Board has said that the individual is the ''alter ego'' of the corporation. See for example *Campo Slacks*, 266 NLRB 492 fn. 1 and 500 at fn. 18.

The second theory is one in which the corporate veil is pierced because there is evidence that the owner or owners have acted or intend to take actions to avoid liability. Thus in *Workroom for Designers*, 274 NLRB 840 (1985), Sissleman, the company's single shareholder and officer had committed most of the ''numerous and egregious'' unfair labor practices. The Board stated that; ''The most important factor in our resolution on this issue, however, is Sissleman's admission at the hearing that he planned to avoid any liability for backpay.''

There are also cases where both elements are present and both used to justify a finding of individual liability. See for example *Air Vac Industries*, 282 NLRB 703 (1987).

[5] Thus far in the hearing the General Counsel has offered some evidence that employees of the company rented apartments owned by David D'Amiano and had their rent payments deducted from their earnings. There also was some evidence that similar payroll deductions were used when employees purchased vehicles owned by members of the D'Amiano family. In addition, one witness, Nehemias Alvarado, testified that on or about November 14, 1991, Joseph D'Amiano told him that he was advised by his lawyer that if the Union won the election, he could sell or close the business and open it again under a new name.

[6] I also note that on June 2, 1992, the Regional Director filed a 10(j) petition relating to this same case in the Federal District Court.

[7] I recognize that the complaint also alleges that certain employees had their earning reduced for discriminatory reasons. Nevertheless, it would seem that unlike a discharge case, those allegations will likely result, even if proven, in a much reduced amount of backpay.

mean, however, that I cannot exercise discretion and defer this issue to the compliance stage if that would result in a more efficient litigation; not prejudicial to any of the parties.

In *Cale v. Outboard Marine Corp*., 48 F.R.D. 328 (D.C. Wis. 1969), the court postponed discovery on damages until the issue of liability had been resolved in a bifurcated proceeding. Similarly, in *Polaroid Corp. v Commerce International Co*., 20 F.R.D. 394 (D.C. N.Y. 1957), the court issued an order limiting the scope of pretrial discovery in a patent suit where the issues of liability and damages were to be tried separately. See generally *Wright and Miller, Federal Practice and Procedure*, Vol. 8, Section 2040.

Unfair labor practice proceedings before the Board are bifurcated as to the issues of liability and backpay. This therefore is analogous to the cases cited above where Federal District Court judges have delayed discovery until after the issue of liability was decided. Those decision are based on a judgement as to how to administer the conduct of a trial in the most efficient manner possible without prejudicing the rights of the parties.

In my opinion, the records and documents subpoenaed are relevant to the proceeding and should, if necessary, be turned over to the General Counsel for inspection and copying. Further at the time of disclosure, I will not impose any restrictions on the General Counsel's use of the documents or on her ability to consult with the Charging Party and its counsel. I will not, however, require that these documents be turned over during the liability portion of this proceeding as this would unduly burden what is already a difficult, lengthy and complex case. Rather, it is my opinion that the issue of individual liability would be more efficiently handled during the compliance stage of this proceeding if one is required.

In making this ruling, it should be noted that I am not revoking the subpoenas. Accordingly, the Respondents shall be required to maintain and preserve any and all of the records which they presently have in their possession and which covered by the subpoenas. Further they shall be required to preserve and maintain for inspection and copying by the General Counsel, any similar or like records or documents that may be generated, sent or received in the future.

APPENDIX B

ORDER

On November 8, 1992, after the close of the hearing, the General Counsel filed a Motion to Admit Documents, which in effect, is construed by me as a Motion to Reopen the Record to receive new evidence. The Respondent objected.

The new evidence sought to be adduced are photographs and the testimony of a fire department official purporting to show that the Respondent continued to use a large machine called the Montgomery Grinder after November 1, 1991, at its worksite in Woodbridge, New Jersey. This is important because the Respondent contended that one of the reasons it laid off a group of employees on November 1, 1991, was because the Montgomery Grinder ceased operating at that time.

There is no question but that the proposed evidence would be relevant to this proceeding. On the other hand, there is no basis for asserting that this evidence was newly discovered, was only available since the close of the hearing or could not have been obtained by the General Counsel with due diligence.

The photographs in question were allegedly taken in November 1991, almost a year before the hearing in this case concluded. They were taken by a public official and there is no reason to believe that the fire department of Woodbridge would not have been cooperative had the General Counsel sought information from them. It was known by all parties to this proceeding from the day that this hearing opened, that the Respondent was contending that the layoffs on November 1, 1991, were caused at least in part, by its assertion that it was forced by the fire department to move from Woodbridge to Carteret and that the timing of the layoffs was principally caused by the shutdown of the Montgomery Grinder. Indeed, as part of its direct case, the General Counsel produced employee witnesses who testified that they observed or heard the Montgomery Grinder in operation after November 1, 1991.

Section 102.48(d)(1) of the Board's Rules and Regulations states in pertinent part:

> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

In my opinion, the position of the General Counsel does not satisfy the requirements of the aforesaid rule or of the case law interpreting that rule. *Field Bridge Associatess*, 306 NLRB 322 fn. 1 (1992), and cases cited therein.

At the close of the hearing, I made arrangements for the parties to review certain company records and the records of a certain doctor. These records had been subpoenaed by the parties during the course of the hearing, and it was agreed that the parties could introduce, after the close of the hearing, all or some of these documents (or summaries thereof), by way of stipulation, or if necessary, that I would reopen the record for the limited purpose of receiving evidence in relation to those records. That arrangement, which dealt with evidence identified and available to both parties during the course of the hearing, does not, in my opinion, justify reopening this record for the purpose of receiving an entirely new category of evidence which was not identified by the parties during the course of the hearing.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Plastic, Metal, Trucking, Warehouse and Allied Workers Union, Local 132-98-102, International Ladies Garment Workers' Union, AFL–CIO as the exclusive bargaining representative of our employees in the appropriate unit.

WE WILL NOT discharge, layoff, refuse to recall or rehire, transfer or otherwise discipline our employees because of their activities or support for the Union.

WE WILL NOT reduce or threaten to reduce the wage rates or piece rates of our employees because of their union activities.

WE WILL NOT offer or promise increased benefits and wages in order to induce our employees to refrain from supporting the Union or engaging in protected concerted activities.

WE WILL NOT threaten our employees with discharge or the sale of our business, on account of their union activities or if the Union were to win an election.

WE WILL NOT coercively interrogate or otherwise intimidate our employees with regard to their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and maintenance employees, including employees employed by the company at Pathmark (Woodbridge, New Jersey) and Rickel's (South Plainfield, New Jersey) but excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL offer all employees who have been found to have been illegally discharged, refused recall or rehire, or transferred, immediate and full reinstatement to their former jobs or, if those job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges, layoffs, warnings or any other adverse actions which have been found to have been unlawful and notify the employees, in writing, that this has been done and that these actions will not be used against them in any way.

DAUMAN PALLET, INC., DAUMAN RECYCLING, INC., AND DAUMAN INDUSTRIES, A SINGLE EMPLOYER, AND JOSEPH D'AMIANO AND DAVID D'AMIANO, INDIVIDUALLY